

# **SECURING OF MARITIME CLAIMS**

Arrest of ships in Norway and Ukraine and Rule B Attachment



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## **1 Introduction**

### **1.1 Securing of maritime claims – a burning issue of maritime industry**

Shipping is a complicated industry which may give rise to a number of claims – monetary and non-monetary, arising on contractual or non-contractual basis. The focus of this thesis will be on monetary claims – arising on any basis – and the protection of the creditor's interests.

Why do claims have to be secured? If debtor does not voluntarily satisfy a claim, creditor must seek for involuntary satisfaction (enforcement of a claim), which can be performed only after obtaining legal basis for enforcement (like a court decision or an arbitral award). Due to the usual timeframes of court or arbitral proceedings and other factors, it can often take a long time, before the basis for enforcement is obtained. During this time the assets of the debtor can simply disappear, they can be sold or disposed of by any other way and at the moment of enforcement of a claim the debtor can be without any assets or they can be hardly reachable. This can put a creditor into quite risky situation of possible incapability of satisfying his claims. Therefore such risk, if it exists, has to be secured, in order to create a guarantee for a claimant, that he will get a satisfaction of his claim, as soon as a ground for enforcement is obtained.

As a starting point, security for the claim can be obtained from the debtor on a voluntary basis in a form of, for example, a bank guarantee, bond or in any other legal way. The problem arises, when voluntary security is not obtained and there is a risk of disposal of debtor's property. In such situations, special actions on securing of a claim must be taken. In the civil law countries the central way of obtaining security is arrest of property of the debtor, which is an action, which limits rights of debtor (defendant) to dispose of/use the arrested assets (i.e. assets, which can be a material basis for satisfaction of a creditor's (claimant's) enforceable claim), to the detriment of the claimant's rights.

Securing of maritime claims<sup>1</sup>, which are claims, arising out of maritime activity, involving ships, due to their specific nature has always been a burning issue of maritime industry. In majority of commercial contracts involving two or more parties, it is usually not difficult to find out, who is the debtor, where is he situated, which assets does he own and it is possible to plan in advance (and it is usually done so) how this debtor can be forced to pay the debts or duly perform the obligations. In shipping situation is different.

Firstly, usage of ships in different types of commercial contracts, like bareboat charters, time-charters, voyage charters etc. usually creates complicated chains of legal relationships, involving companies and entrepreneurs from different countries. In charter party relations sometimes it is not obvious from the beginning, who is actually the debtor, liable for a specific type of claim. Thus, it can take some time first to find out, who the actual debtor is, which assets does he own and where they are situated, than which procedural rules will apply to filing a claim against the debtor etc. It can often appear that the debtor does not have any assets in the country of creditor and can have them practically in any country of the world, which makes it harder for a creditor to arrest them.

Secondly, maritime claims very often arise on non-contractual basis, like claim for damages caused by collision or claims for personal injury caused in connection with the operation of the ship. In such situations all the abovementioned difficulties become even more challenging.

Thirdly, nowadays, when “one-ship companies”, which practically do not own any other assets than a ship, are extensively used, arrest of other property can be impossible because such property simply does not exist or is insufficient to satisfy the claim.

Due to the abovementioned factors, a need for specific procedures to secure a maritime claim, which will grant a creditor additional protection, arose. Traditionally, such specific procedure has been arrest of ships, which is the most popular way to secure a maritime

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<sup>1</sup> For broader definition of maritime claim see below in 2.2

claim nowadays. It is relatively simple to get the ship arrested, as the creditor is often aware, in which port it is situated and if not, it is usually not difficult to find out which port the ship will be calling next. Moreover, existence of International Convention Relating to the Arrest of Sea-Going Ships (Brussels, May 10, 1952) (hereinafter – Brussels convention), which unifies the rules for arrest of ships in many maritime jurisdictions in the world (convention is ratified by more than 80 countries including Norway, but not Ukraine) makes arrest of the ship even more attractive option. It must be mentioned, that some maritime claims are secured by maritime liens<sup>2</sup>, which can provide additional advantages for the creditor when arresting a ship.

Besides, during last years a great popularity gained an alternative way of securing a maritime claim – attachment of Electronic Fund Transfers (EFTs) in US dollars coming from the debtor, according to the procedure named “Rule B attachment”, stipulated by Rule B of the Supplemental Rules for Admiralty and Maritime Claims of the Federal Rules of Civil Procedure of the USA. It became popular, as it can be applied to secure a maritime claim, litigated practically anywhere and the claimant and defendant can be from any countries.

## 1.2 Intentions

In this thesis I have an intention to give an overview of specific possibilities to secure a maritime claim available to claimants from all over the world, based on the legal regimes of arrest of ships in Norway and Ukraine, as well as on Rule B attachment. Due to the fact, that the Brussels convention was ratified by Norway, and not ratified by Ukraine, such analysis, I hope, will give to the reader an overview of possible complications, which can arise, when arrest of a ship is sought in a country party to Brussels convention and in a country, which is not. With respect to Norway specific attention will be paid to the issues of arrest of a ship, not owned by a debtor, as well as to the specific requirements of “arrest

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<sup>2</sup> See below in 2.3

ground”. Regarding Ukraine, which has very unclear rules regarding arrest of ships, I intend to focus on specific problems, which the claimant can face and come with specific proposals regarding amendments to Ukrainian legislation in order to bring arrest rules in compliance with internationally recognized practice. Moreover, a brief legal analysis of Rule B attachment of EFTs will be made with a view to its advantages and disadvantages comparing to ship arrest, in order to provide the reader with a broader view on specific remedies, which are used to secure maritime claims nowadays.

### 1.3 Limitations

The thesis intends to have a practical character; therefore analysis of historical developments in the sphere of securing maritime claims, as well as pure theoretical researches will not be made. The analysis will be limited to arrest only of privately-owned ships and Rule B attachment for securing a maritime claim. Arrest of state-owned ships, as well as arrest of ships by state bodies or port authorities will not be analyzed. Other possibilities of securing maritime claims, like arrest of cargo, bunkers etc. will not be analyzed.

### 1.4 Legal sources

Within the scope of the thesis domestic legislation and case law of Norway and Ukraine, as well as relevant international conventions will be analyzed. Specific attention with a view of arrest of ships will be paid to the provisions of the Brussels convention. Particularly, the notions of arrest of ship and maritime claim will be explained on the basis of its provisions, as it, in my opinion, reflects international understanding of the mentioned terms. International Convention on the Arrest of Ships (Geneva, March 12, 1999) (hereinafter – Geneva convention) will not be analyzed in detail, as it has not yet come into force. With respect of Rule B attachment federal laws of US, state laws of state of New York, as well as court practice of state of New York will be analyzed.



## 1.5 Structure

In the chapter 2 I will give a general overview of specific legal notions, relevant to the subject of research. Chapter 3 will be devoted to the legal regime of arrest of ships in Norway, Chapter 4 – in Ukraine, in Chapter 5 I will give an overview of legal basis and practical issues of application of Rule B attachment and Chapter 6 will summarize my conclusions on the discussed matters, as well as proposals regarding legislative development.

## **2 General on arrest of ships**

### **2.1 The notion of arrest of ship**

Article 1(2) of Brussels convention contains the following definition of arrest of ship: “Arrest” means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment”. Thus the concept maritime claim is of fundamental importance, as conventional regime provides possibility of arrest of ship only for securing a maritime claim.

Three important specific functions of arrest of ship can be pointed out:

- a) From the practical point of view, arrest of ship can be used to force a debtor to consider a monetary maritime claim, of which he would not take account otherwise. Arrest of ship can cause enormous financial losses for the shipowner; therefore in practice debtors try by different means to avoid it and settle the dispute with the claimant.
- b) Arrest of a ship provides a material security (within the value of arrested ship) for the satisfaction of claim.
- c) Arrest of a ship can operate as a ground for jurisdiction. For example par. 4-5 (5) of Norwegian Civil Procedure Act (Lov om mekling og rettergang i sivile tvister, Tvisteloven) of 2005.06.17 (hereinafter – NCPA) provides that if the vessel is arrested in Norway, or if security is posted to avoid or lift an arrest, a case can be filed in the forum where arrest was made if it relates to the claim which triggered the arrest. But not in all countries this is the case – with respect of Ukraine see below.

## 2.2 Nature of a maritime claim

Claims, which arise out of maritime activity, involving ships, like ownership and other proprietary rights on ships, shipbuilding, usage of ships, salvage etc. are considered to be maritime claims. International acts, as well as national legislation of many countries rarely give an exact definition of what a maritime claim is, providing instead an exhaustive list of claims, which are to be considered maritime. A notion of maritime claim is of major importance, as usually a ship can be arrested only to secure a maritime claim. This is an internationally recognized principle, which is reflected in international acts (Brussels convention), as well as national maritime legislation of many countries, though not in all countries this principle works and there are some exclusions from the general rule.

Article 1 of Brussels convention (letters a-q) contains a list of specific claims of maritime nature, which in one or another way may relate to the ship, can arise out of its operation, as well as out of use of a ship as a security (mortgage) and right of ownership on a ship, with respect of which the arrest of a ship can take place. The fact, that this list is exhaustive has never been disputed<sup>3</sup>, therefore claims, which fall outside the scope of Article 1 of the convention will not be considered as a ground for arrest of ship under conventional regime. As examples of maritime claims can be named claims arising out of damage caused by a ship in a collision, of loss of life or personal injury caused by a ship, of charter party relations, of salvage, general average etc<sup>4</sup>. Article 92 of Norwegian Maritime Code (Lov om sjøfarten of 1994-06-24 nr 39) (hereinafter –NMC) almost resembles the named article of Brussels convention. List of maritime claims in Ukrainian legislation is slightly different, but the nature of the notion is, in principle, the same.

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<sup>3</sup> Berlingieri (2006), p. 49

<sup>4</sup> For a complete list of maritime claims see Art. 1 of Brussels convention

### 2.3 Relation between maritime claims, maritime liens and ship mortgages

Maritime claims must be distinguished from claims secured by maritime liens. The concept of maritime liens is very common in maritime law and is regulated in national legislation of many countries, as well as by international conventions. Maritime liens have special characteristics, which make them an important concept of maritime law: they arise automatically with the relevant claim directly on the basis of legislation and do not need special registration; they have priority ahead of any other encumbrances and they have a very short limitation period<sup>5</sup>. Article 51 of NMC contains an exclusive list of the claims against the *shipowner or any person*, to whom he delegated his functions, secured by maritime liens *against a ship* (claims which relate to wages, port and canal dues, damages in respect of loss of life or personal injury etc.). Therefore the owner of the ship must not necessarily be personally liable for a claim for a maritime lien against a ship be effective – liable person can be anyone, to whom shipowner delegates his functions, like charterer (not only bareboat, but time and voyage charterer as well). This can result in situation that a ship can be subject to arrest even if the owner is not personally liable for a claim<sup>6</sup>.

It is worth mentioning, that Norway (as well as Ukraine) is a party to the International Convention on Maritime Liens and Mortgages of 1993 (hereinafter – Maritime liens convention), which entered into force in 2004. NMC almost reiterates the list of claims, secured by maritime liens, contained in the mentioned convention. In addition NMC Section 61 et. seq. contains rules on maritime liens on cargo, which are not regulated by 1993 Convention.

Practically all claims, secured by maritime liens according to Maritime liens convention fall within the definition of maritime claims in the Brussels Convention (and section 92 of NMC), though the list of maritime claims is much broader. Thus, there are maritime claims, not secured by maritime liens. From another angle, almost all claims, secured by maritime liens, are also maritime claims, which give rise to arrest of the ship under the

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<sup>5</sup> Falkanger (2008) p. 119

<sup>6</sup> See below in 3.3.2

Brussels convention, but not necessarily. According to the view of Norwegian Ministry of Justice, there may be cases, where claims are secured by maritime liens without being “maritime claims”<sup>7</sup>. As mentioned above, the characteristic feature of a maritime lien is its short limitation period – it becomes time-barred one year from the day when the claim arose (Art. 9 of Maritime liens convention). Arrest has important effect on the time-barring: it is stopped if prior to the expiry of the time limit the ship is arrested and the arrest leads to a forced sale (see i.e. NMC section 55, Art.9 of Maritime liens convention).

A claim secured by a ship mortgage falls within the list of maritime claims, listed in the Brussels Convention, as well as in NMC. Therefore the mortgage of a ship, which is duly registered and valid, may give the claimant right to arrest a ship in Norway. The situation can, of course, be different in other countries.

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<sup>7</sup> Falkanger (2000) p.19

### 3 Arrest of ships in Norway

#### 3.1 General on arrest of ships in Norway

From 1.01.2008 in Norway general rules on securing of claims are contained in Part 7 (Temporary security) of NCPA. Chapter 32 of NCPA deals with General provisions on securing of claims, Chapter 33 deals with Arrest and Chapter 34 deals with Interim measures.

Before 1.01.2008 general rules on arrest and on interim measures were in respectively Chapters 14 and 15 of Norwegian Enforcement of Claims Act (Lov om tvangsfullbyrdelse of 1992-06-26 No 86) (hereinafter – NECA).

According to § 32-1 of NCPA, temporary security for a claim can be obtained in two forms: *arrest* and *interim measure*. Arrest can be applied if a claimant (creditor) has a monetary claim against a defendant (debtor) (§ 32-1 (2) of NCPA) and interim measure can be used if the claim is of non-monetary nature (§ 32-1 (3) of NCPA) (will not be analyzed further).

After Norway in 1993 ratified the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters of 1988 (hereinafter – Lugano convention), it had to accept the Brussels convention<sup>8</sup>. The provisions of the Brussels convention were incorporated into chapter 4 (sections 91-98) of NMC<sup>9</sup>, which contains specific provisions

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<sup>8</sup> See Art. 54A of Lugano convention

<sup>9</sup> Falkanger (2000) p.4

on arrest of ships. Connection between the general provisions in NCPA and special provisions of NMC is established in § 32-3 (1) of NCPA, stating that with respect to arrest of ships the rules in chapter 4 of NMC shall also apply. Section 98 of NMC also provides that general provisions of NCPA are applicable in all cases, not regulated by special provisions of NMC, including:

- the relation to international law and foreign State-owned ships and other foreign ships;
- the liability of the plaintiff for costs and damages and the right of the Court to order the plaintiff to provide security for possible liability for damages;
- the conditions for arrest;
- the procedural rules concerning the application for arrest;
- the legal effects of arrest.

Section 91 of NMC contains exclusions, in case of which the rules in sections 92, 93, 94 and 96 of NMC do not apply. To such cases, the provisions of Chapters 32 to 34 of NCPA apply in full. The provisions of the chapter 4 of NMC do not apply to arrest that is limited to cargo, freight, fuel or parts of ships.

Thus, if a claimant has a monetary maritime claim there are several specific options available to secure this claim in Norway, which are of interest to this thesis:

1. First option is *to arrest a ship*, based on the legal regime, stipulated by Brussels Convention, by rules in Chapter 4 of NMC, supported by general rules in NCPA (as provided by Section 98 of NMC)<sup>10</sup>.
2. Second option is *to arrest a ship according to general rules* in NCPA (par 32-34) and art. 95 of NMC, if exclusions in NMC Section 91 apply<sup>11</sup>.

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<sup>10</sup> Ibid

<sup>11</sup> Ibid

3. Third option, if the arrest object is not a ship, the arrest can be done based on *the general rules on securing claims in NCPA*<sup>12</sup>.

### 3.2 General arrest rules

#### 3.2.1 Arrest and arrest ground

§ 32-1 (2) of NCPA provides, that a person, who has a monetary claim against another person can demand a security for this claim by way of arrest according to chapter 33 of NCPA, if “arrest ground” exists.

Arrest is an attachment of debtor’s assets, which is alike, but not identical with an execution lien<sup>13</sup>. § 33-1 of NCPA also stipulates that arrest can have a form of prohibition for debtor to leave a country (will not be discussed further).

Generally, a claimant, demanding arrest and a debtor, whose assets can be arrested can be any natural person or legal entity, though, according to § 33-1 (2), claims against the state or local authorities can not be secured by arrest.

For arrest of property an “arrest ground” must be present, which is defined in § 33-2 of NCPA. In accordance with the stated provision, “arrest in assets of economic value can be decreed when the behavior of the debtor gives reason to fear that the enforcement of the claim otherwise will either be made impossible or substantially more difficult, or has to take place outside Norway”<sup>14</sup>. It does not matter, if the claim is due or not.

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<sup>12</sup> Ibid.

<sup>13</sup> Ibid, p.5

<sup>14</sup> Falkanger (2000), p.6



Creditor has a burden to prove to the court the existence of a claim and of an arrest ground. Though, if there is a risk of a delay, the court can decree an arrest even if the claimant has not satisfied this requirement, but in such case an obligatory security must be posted (§ 33-3 (2) of NCPA).

It is necessary to point out, that the requirement of arrest ground is applicable not only when the arrest is conducted under general rules of NCPA, but to arrest of ships under Brussels convention regime as well (Section 98 of NMC). At the first glance, this can be seen as an important deviation in Norwegian law from the rules of Brussels convention, as the convention does not have requirement on arrest ground – the existence of a maritime claim is in itself enough to arrest a ship under conventional regime. The practical effect of such deviation is not so crucial though. § 33-2 (3) of NCPA provides, that arrest of a ship can be decreed without special arrest ground if a creditor has a claim which is due and secured in the ship. Claim, which is “due and secured in the ship” means due mortgage, execution lien or maritime lien in a ship<sup>15</sup>. As most maritime claims, listed in Brussels convention and NMC are also secured by maritime liens (not all though), the arrest ground can be required only in some cases<sup>16</sup>. Anyway, requirement on arrest ground in Norwegian law must be borne in mind by foreign creditors, wishing to arrest ships or other property in Norway.

### 3.2.2 Jurisdiction

§ 32-4 of NCPA regulates the authority to decree an arrest. In general, decreeing an arrest in Norway is within the competence of the court of first instance (Norw.: tingretten). The court of first instance is competent in two cases:

1) if a debtor has a home venue within the geographical district of the court. § 4-4 of NCPA stipulates that “home venue”:

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<sup>15</sup> Ibid p.14

<sup>16</sup> See above in 2.3

- for a natural person is his domicile;
- for a legal entity registered in Norwegian Registry of Companies where its head office lies;
- for a foreign legal entity, which has a branch in Norway where this branch lies.

2) if a debtor has assets within the geographical district of the court. If the assets are movables (car, consignments of goods etc.), the competent court can be the one in whose district the movable can be expected to come in the near future.

§ 33-6 of NCPA stipulates that the object of arrest can be generally any asset belonging to the debtor, which can be a subject to an enforcement lien. According to § 2-2 of Norwegian Creditor's Seizure Act of 8.06.1984 (Lov om fordringshavernes dekningsrett) (hereinafter – NCSA), subject to enforcement lien can be any asset, belonging to a debtor, which can be sold, leased or in any other way made into money, subject to minor exclusions in § 2-3 of CSA (personal property of the debtor, necessary to secure his minimal standard of living, like clothes etc.). Arrest can be decreed also in future payments.

Thus, the debtor does not have to be Norwegian or to have a home venue in Norway. As soon as he has the assets, which are, or will in near future, be in Norway, they can be arrested.

### 3.2.3 Procedural aspects of decreeing arrest. Security

The procedure of decreeing arrest is stipulated in § 32 and §33 of NCPA. The arrest application can be filed to the court in writing or orally (§ 32-5) and must contain explanation of a claim against a debtor, its size, as well as an arrest ground (if necessary). The court can demand that the documents are to be translated into Norwegian, though normally documentation in English is accepted<sup>17</sup>. Based on the application, the competent court can either reject the application (if it contains mistakes the claimant can be given time to correct them), decree arrest after oral hearing with presence of defendant or ex parte

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<sup>17</sup> Smith (1997) p. 169

(without notification of defendant), if the delay is risky (decided upon court's discretion). In case of ex parte decree, the defendant has a right to subsequent oral hearing to dispute the correctness of arrest.

§33-3 provides that court can oblige a claimant to post a security as a precondition for implementation of an arrest decree. The function of such security is to guarantee to the debtor, that he will be compensated for losses, caused by the wrongful arrest. According to § 32-11, creditor is strictly liable for loss caused by wrongful arrest (if the underlying claim did not exist at the moment, when the arrest decree was passed). If the arrest appears to be unwarranted for other reasons, the claimant is liable for losses caused based on negligence.<sup>18</sup>

It must also be mentioned, that the debtor has at any time possibility to prevent the arrest by way of posting a security (§33-5 (3)).

Usually, a guarantee from a Norwegian bank is sufficient security in all mentioned cases (§32-12 and § 3-4 of NECA). In practice, the parties can agree to accept as a security a Club Letter of Undertaking from a P&I club. Most of P&I clubs issue such letters, but they are not recognized by Norwegian law, therefore can only be used, when the parties agree on it<sup>19</sup>.

The decision on arrest is passed by the court in the form of a decree. Sometimes the court can decide to leave the decision, which object should be arrested, to the enforcement officer in a specific district (§33-5). The arrest is enforced according to the general rules in NECA. The decree is subject to an appeal to the Court of Appeal, and its decree may be appealed to the Appellate Committee of the Supreme Court<sup>20</sup>.

#### 3.2.4 Legal effects of arrest

The general effects of arrest are summarised in § 33-7. They are the following:

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<sup>18</sup> Falkanger (2000) p.13

<sup>19</sup> Herlofsen (2006)

<sup>20</sup> Falkanger (2000) p.9

- The main effect of arrest of an asset is that the debtor loses his right to dispose (both physically and legally) of the arrested asset to the detriment of the creditor. The debtor still has a right to mortgage the arrested asset, as a mortgage will rank after the registered arrest.
- The arrest does not prevent other creditors from enforcing their claims – they may obtain an execution lien on the arrested object, which will have a priority before already registered arrest<sup>21</sup>.
- The arrest does not give the creditor a right to sell the arrested object. This can be only possible if there is a risk of “substantial reduction in value” of the arrested object. Generally, in order to have the arrested object sold, the creditor must obtain a judgment on the underlying claim, which will create a basis for execution lien<sup>22</sup>.
- The arrest can provide a jurisdiction for an underlying claim. § 4-3 (2) of NCPA provides, that if a debtor has assets in Kingdom, which can be used to cover the creditor’s claim, the claim can be filed in the venue, where these assets are.
- Arrest is a preliminary measure therefore the claimant is obliged to instigate a suit regarding the underlying claim. Defendant has a right to demand that a court sets a time limit for such instigation (§ 33-4 (2) of NCPA).
- Claimant bears liability for wrongful arrest (§ 32-11 of NCPA).

### 3.3 Arrest of ships based on a legal regime of Brussels convention and NMC

As mentioned above, the arrest of ships in Norway can be governed by the Brussels convention, NMC, supplemented by some general rules in NCPA and other Norwegian legislation (as provided by NMC Section 98)<sup>23</sup>.

#### 3.3.1 When can a ship be arrested based on the Brussels convention regime?

The provisions of Brussels Convention were incorporated into Chapter 4 (sections 91-98) of NMC.

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<sup>21</sup> Ibid p.11

<sup>22</sup> Ibid

<sup>23</sup> See above in 2.1

Section 91 of NMC defines the scope of application of rules of NMC (and Brussels convention) to arrest of ships. According to the named section, provisions of NMC apply to arrest of ships according to Chapters 32 and 33 of NCPA, subject to a number of exclusions, in case of which Sections 92, 93, 94 and 96, which constitute the essence of rules on arrest of ships in Brussels convention, do not apply. These exclusions in fact stem from the definition of “arrest” in article 1 (2) of Brussels convention, which is *detention of a ship* by judicial process to secure a maritime claim, but *does not include the seizure of a ship in execution or satisfaction of a judgment*”; from the preamble to the convention, which limits its application to seagoing ships and from Article 2 of the convention, which does not extend the conventional rules to rights of governments, public authorities, or dock or harbor authorities under domestic laws or regulations to arrest ships.

The exclusions are as follows:

1) Arrest of ships the registration of which is not mandatory according to Section 11 (2) of NMC.

Section 11 contains general rules on ships, which are subject to registration in Norwegian Ship Register (for Norwegian owned and operated ships) or Norwegian International Ship Register (for Norwegian and non-Norwegian owned ships). Norwegian owned ships of 15 meters and more length are obliged to register in one of the Norwegian ship registers, if they are not registered in any foreign register. In practice this means that ships of 15 meters and more can be arrested only for maritime claims under the conventional regime. It must be mentioned, that NMC has little broader application than the convention – rules of NMC apply both to sea going and not sea going ships<sup>24</sup>.

2) Arrest which does not entail the detention of the ship according to the provisions of Section 95 (2) of NMC.

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<sup>24</sup> Falkanger (2000) p. 16

Section 95 (2) stipulates, that a ship arrested according to § 33-2 (3) of NCPA, must not leave its berth until a forced sale has been completed or the ship commences operation under the orders of the Court. § 33-2 (3) of NCPA provides, that arrest of a ship can be decreed without special arrest ground if a creditor has a claim which is due and secured in the ship. Claim, which is “due and secured in the ship” means due mortgage, execution lien or maritime lien in a ship<sup>25</sup>. As execution lien is expressly excluded from the scope of Brussels convention by Article 1 (2), existence of due mortgage or maritime lien in a ship secures application of Brussels Convention regime to arrest of ships in Norway. Thus, if a claimant has a maritime claim, which is not secured by a maritime lien (i.e. claims with respect to goods or materials delivered to a ship for use in its operation and maintenance or claims arising from the building, repair or fitting out of a ship) and he does not have a due mortgage in a ship, such claim falls outside the Brussels convention regime and arrest will be subject to general rules of NCPA.

Section 95 (3) of NMC provides an exclusion from this general rule: with respect to the ships, which are duly registered and arrested under the provisions of § 33-2 (1) of NCPA, the court can decide detention based on Section 95 (2) of NMC, if this is considered necessary to secure a claim. Thus, the court can in its discretion apply Section 95 (2) of NMC. In this case, the legal regime of the convention will be applicable.<sup>26</sup>

3) Arrest demanded after a basis for enforcing the claim as mentioned in Section 4-1 paragraph one of NECA has been established.

4) Arrest for the purpose of provisionally securing claims for taxes and duties and other claims under public law, or for securing or implementing other public decisions.

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<sup>25</sup> Ibid p.14

<sup>26</sup> Ibid

Section 92 of NMC provides, that a ship may be arrested only to secure a maritime claim, list of which is also provided by this section<sup>27</sup> (stems from Article 1(2) of Brussels convention).

### 3.3.2 Which ships can be arrested. Arrest of sister ships and personal liability

According to the Section 93 (a) of NMC and Article 3 (1) of the Brussels convention, arrest can only be effected against the ship to which the maritime claim relates. This is the starting point in both acts, though there is an exclusion called "sister ship rule": if the owner of the ship to which the maritime claim relates is personally liable for the claim, other ships owned by that person at the time when the claim arose, can be arrested (Section 93(b) of NMC and Article 3(1) of the Brussels convention). Moreover, if someone other than the owner of the ship to which the maritime claim relates is personally liable for the claim, other ships owned by the liable person can be arrested (Section 93 (c) of NMC and Article 3 (4) of the Brussels convention). The last exclusion is applicable in case, when, for example, the person who is liable for a maritime claim is a bareboat charterer and not an actual owner of the vessel.

It must be pointed out, that Article 3 (4) of the Brussels convention provides, that a ship, which is bareboat-chartered can be arrested if a bareboat-charterer (and not the actual owner of the ship) is liable with respect to a specific maritime claim. This possibility is limited by NMC in the last sentence of Section 93: arrest can only be effected if the ship can serve as an object for the enforcement of a claim according to the general provisions of NECA (by analyzing provisions in Sections 11-4 and 7-1 of NECA, a clear conclusion can be made, that the debtor must be the owner of the ship). Therefore, generally, NMC does not allow the arrest of the vessel, if the debtor for a maritime claim is not the owner. It is necessary to state, that the abovementioned approach was reached by specific interpretation of Article 3 (4) of Brussels convention, and is not considered contrary to it. Professor Allan Philip expressed a view, that since the purpose of Brussels convention is to limit the cases

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<sup>27</sup> The nature of maritime claims is described in 1.3

where the arrest can be made, and not to provide in which cases arrest must be made, it can not be considered contrary to the convention that a national law of a state party limits the possibility of arrest to cases, when the owner is personally liable<sup>28</sup>. This view was accepted not only by Norway, but also by Denmark, Sweden and Finland<sup>29</sup>.

Though there is a recognized exclusion from this general rule: when the claim is secured by a maritime lien, the arrest of the ship is still possible, even if the owner of the vessel is not personally liable<sup>30</sup>. This was clearly stated by Norwegian Maritime Law Association (NMLA) in answering questions 2.1. and 2.2. of Questionnaire II on the implementation of Brussels convention<sup>31</sup>. The representative of NMLA stated, that according to the provisions of NMC (Section 51 et. seq.) a maritime lien can be enforced against the owner of the vessel, although the owner is not personally liable for the claim. In practice this means, that if a bareboat chartered ship causes a collision, for which a bareboat charterer (and not the owner) bears responsibility, the ship can be arrested in Norway, as the claim for damages is secured by a maritime lien. The owner of the ship will be defendant in the arrest proceedings<sup>32</sup>. This approach is accepted by Denmark, Sweden and Finland as well.

Article 3(1) of Brussels convention contains an important exception from the “sister ship rule”: with respect to maritime claims, stipulated in the letters o, p and q of Art. 1(1) of Brussels convention the arrest can only be effected against the ship to which the claim relates. Art. 10 (b) of Brussels convention allows the states, parties to the convention, not to apply the mentioned exception to letter q of Art. 1 (1) (any mortgage or security in the ship, except of maritime lien). Norway decided to use this reservation (Section 93 (3) of NMC), therefore, in Norway a creditor, having a mortgage in a ship can arrest a sister ship in order to obtain additional security for his claim<sup>33</sup>.

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<sup>28</sup> Berlingieri (2006) p. 142. Philip (1977) p. 118

<sup>29</sup> Berlingieri (2006), p. 144

<sup>30</sup> Falkanger (2000) p. 21,22

<sup>31</sup> Berlingieri (2006) p. 415-416

<sup>32</sup> Falkanger (2000) p. 22

<sup>33</sup> Ibid p. 28



### 3.3.3 Jurisdiction. Procedural issues

The Brussels convention has no special rules on jurisdiction to decree arrest of ship, but such rules are found in Section 95 of NMC, applicable to arrest of ships. It must be underlined, that the rules in Section 95 are applicable to arrest of ships notwithstanding whether the ship is arrested under the Brussels convention regime or the general rules of NCPA, though they are not very different from general arrest jurisdiction rules, stipulated by § 32-4 of NCPA. According to Section 95 of NMC, a decision to arrest a ship can only be taken if the ship is in or is expected to arrive in the jurisdiction of a specific court or in the district of the enforcement officer if he or she is to select the object of the arrest. If the ship is not in Norwegian port, the claimant usually has to present evidence, that the ship will be calling Norwegian port in the nearest future. Arrest can be effected only if the ship is in Norway. The arrest can be effected even if the ship is in another jurisdiction in Norway than the one where the arrest was granted. In any case, an arrest can be granted and effected if the ship is engaged in activities on the Norwegian continental shelf. Procedural rules in part, not regulated by Section 95 of NMC are regulated by § 32 and §33 of NCPA<sup>34</sup>.

Arrest of ships is in most cases decreed *ex parte* (without the defendant/shipowner presence), as usually there is no time to arrange an oral hearing before the ship sails<sup>35</sup> (§32-7 (2) of NCPA). The defendant may apply for oral hearing after the arrest, if he wants to challenge the correctness of the arrest (in accordance with §32-8 of NCPA).

Usually it does not take more than 24 hours from the moment of receiving an application to issue a decision on arrest of a ship. The arrest order is then served upon the Master of the ship by the enforcement officer (usually the local police), and the ship's certificates are then detained by the enforcement officer<sup>36</sup>.

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<sup>34</sup> See above in 3.2.3

<sup>35</sup> Herlofsen (2006)

<sup>36</sup> Ibid

The procedural costs for decreeing an arrest are relatively low, in range of NOK 2,000 – 3,000<sup>37</sup> and they must be paid by the claimant. Though, other expenses in connection with arrest must be taken into account. These are:

- Expenses incurred during detention period (harbor dues, maintenance etc.), which are as a general rule are paid by the defendant, though in case of unwarranted arrest they may end up with a claimant<sup>38</sup>.
- Lawyer's fees.

#### 3.3.4 Legal effects of arrest of ship

In addition to general legal effects of arrest, stipulated by § 33-7 of NCPA<sup>39</sup>, there are some specific effects, stipulated by Section 95 of NMC, which must be mentioned.

Section 95 (2) of NMC provides that if a ship is arrested according to Section 33-2 (3) of NCPA (for a claim based on due mortgage, execution lien or maritime lien in a ship or for claims on another basis, if the court decides so (Section 95 (3) of NMC)):

- a) the ship must not leave its berth until a forced sale has been completed or the ship commences operation under the orders of the Court;
- b) if an arrested ship is not in Norway when its arrest is granted, the defendant can be ordered to bring it to a designated place. After its arrival, the prohibition mentioned in a) shall apply.

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<sup>37</sup> Ibid

<sup>38</sup> Falkanger (2000) p. 34

<sup>39</sup> See 3.2.4. above

At the request of the plaintiff, and on specific conditions, the Court can nevertheless permit the ship to commence its operations in or outside Norway.

Arrest of the ship can create jurisdiction with respect to the underlying claim. The rules on jurisdiction of courts to decide the case upon the merits are stipulated by Article 7 of Brussels convention. Article 7 at the first place leaves it to the national legislation to determine if the arrest should give such jurisdiction to the national courts. As an alternative, the mentioned article provides a list of situations, where such jurisdiction should exist. In Norway this matter is given to national legislation and is reflected in provisions of NCPA. § 4-5 of NCPA generally refers to the cases, where the jurisdiction can be chosen by the claimant. § 4-5 (5) of NCPA specifically provides, that in case of arrest of the ship, a claim, underlying arrest can be filed to the court in the district, where arrest was granted.

### 3.4 Arrest of ships in accordance with general rules on arrest in NCPA

As was mentioned above in 3.1, arrest of ships can be effected in accordance with general rules on arrest in NCPA, supplemented by rules in Section 95 of NMC, if exclusions stipulated by Section 91 of NMC apply. In such case arrest of the ship can be decreed for any type of claim (not only maritime). General rules on arrest were analyzed above in 3.2. Besides the general rules, which apply to arrest of any property, there are some special rules with respect to ships, stipulated in NCPA and Section 95 of NMC. These special rules are the following:

- jurisdiction rules (Section 95 (1) of NMC) (see 3.3.3. above);
- effects of arrest (Section 95 (2) and (3) of NMC) (see 3.3.4. above);

- arrest grounds (§ 33-2 of NCPA) (see 3.2.1. above).

Finally, it has to be mentioned, that Section 507 of NMC extends the rules on arrest in chapter 4 of NMC to drilling platforms and similar mobile constructions. Therefore these can be arrested in Norway if the arrest is outside Brussels convention regime.

## **4 Arrest of ships in Ukraine**

### **4.1 Generally on arrest of ships in Ukraine**

In the previous chapter was given an overview of securing maritime claims in Norway, a significant maritime power, having a long maritime law tradition with clear rules, applicable to arrest of ships, making Norway a favorable jurisdiction for maritime claimants (and predictable place for debtors) from all over the world. The situation in Ukraine, which has not adopted the Brussels convention, is very different. Ukraine is a young country and young maritime power, which has its influence on general maritime law and on regime of securing maritime claims as well.

The notion “maritime claim” was as such absent in Ukrainian legislation before Code of merchant shipping of Ukraine of 23.05.1995 No 176/95-BP (hereinafter – CMSU) was enacted in 1995. Chapter 4 of section 2 (articles 41-47) of CMSU is called “Arrest of ships” and contains specific rules on arrest of ships in Ukraine. The list of maritime claims, for which the ship can be arrested is contained in article 42, which practically restates the list of maritime claims contained in Article 1 of Geneva convention. It must be underlined, that Geneva convention has not yet come into force due to insufficient number of ratifications (at the moment it is ratified by 7 states, requiring 10 ratifications to come into force). Ukraine, like Norway, has not ratified the Geneva Convention, though representatives of both countries took part in the Diplomatic conference on arrest of ships, in Geneva in 1999, and signed its final act, which was the mentioned convention. Article 1 of this convention (Article 42 of CMSU) has a closed list of maritime claims giving rise to a right of arrest. Compared to the corresponding provisions of the Brussels convention, the

list of maritime claims is longer (new claims include environmental damages; vessel sale and purchase contract disputes; wreck removal; port, harbor and canal dues; and insurance claims). Therefore Ukrainian legislation at the moment has a wider list of maritime claims, than Norwegian legislation.

According to Article 42 of CMSU, arrest means any detention or restriction on removal of a ship to secure a maritime claim during ships presence in a sea port of Ukraine, but does not include measures for execution of valid judgments of a court or economic court. Article 42 of CMSU also provides that arrest of vessel or release of vessel from arrest can be decreed only by decision of a general court, economic court<sup>40</sup> or head of Maritime Arbitration Commission<sup>41</sup>.

Article 43 of CMSU provides the conditions, under which the ship can be arrested (restating the provisions of Article 3 of Geneva Convention). The ship can be arrested for a maritime claim if:

- the claim is secured by a maritime lien (stipulated by sections 1,2, 3-5 and 7 of Art. 358 of CMSU);
- the claim is based upon a mortgage or a charge of the same nature on the ship;
- the claim relates to the ownership or possession of the ship;
- the person who owned the ship at the time when the maritime claim arose is liable for the claim and is owner of the ship when the arrest is effected;
- the bareboat charterer of the ship at the time when the maritime claim arose is liable for the claim and is bareboat charterer or owner of the ship when the arrest is effected.

Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is liable for the maritime claim and who was, when the claim

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<sup>40</sup> The courts of general jurisdiction in the court system of Ukraine are divided, based on the types of cases, which they consider, into general courts, economic courts and administrative courts. General courts deal with civil and criminal cases, usually involving natural persons (with some exclusions). Economic courts deal mainly with disputes mainly involving legal entities and private entrepreneurs (with some exclusions), which have commercial nature

<sup>41</sup> Permanent arbitration body under the Chamber of Commerce of Ukraine, which deals with maritime cases

arose owner of the ship in respect of which the maritime claim arose or bareboat charterer, time charterer or voyage charterer of that ship. This provision does not apply to claims in respect of ownership or possession of a ship.

Other provisions of Chapter 4, Section 2 of CMSU regulate release from the arrest upon posting of security (Art. 44 of CMSU, resembles Art. 4 of Geneva convention), right of re-arrest and multiple arrest (Art. 45 and 5 respectively), protection of owners and bareboat charterers of arrested ships (Art. 46 and 6) and arrest of state-owned ships (Art. 47).

It has to be underlined, that making the provisions of CMSU on arrest of ships in compliance with provisions of Geneva convention (to be more precise – with its earlier drafts) was an attempt of Ukrainian government to adopt internationally recognized arrest rules. But unfortunately, this attempt failed due to a number of reasons.

The first reason can be found in Art. 14(1) of CMSU, which stipulates, that arrest rules in CMSU apply only to ships, flying Ukrainian flag. This makes these rules inapplicable to foreign ships. But this is not the only problem with Ukrainian legislation, which makes the procedure of arrest of ships in Ukraine a quite bizarre process.

The second, and more important problem, is that CMSU does not contain any procedural rules whatsoever on arrest of ships. Art. 4 of CMSU states, that all matters, not governed by CMSU must be governed by provisions of general legislation of Ukraine, which naturally refers us to provisions of general procedural legislation of Ukraine. And general procedural legislation of Ukraine does not contain any references to specific provisions of CMSU and any provisions whatsoever with respect to arrest of ships. The result of this is absolutely disastrous – ships in Ukraine, no matter, whether foreign or Ukrainian, can be arrested only in accordance with general procedural rules. That will say, the ship can be arrested on the basis of any claim (non-maritime as well) and without taking into account

the specifics of shipping industry<sup>42</sup>. Moreover, there are no special jurisdiction rules with respect to arrest of ships. And according to general jurisdiction rules the arrest can be decreed only by the court which has a jurisdiction to decide the underlying claim on the merits<sup>43</sup>. All this nullifies the practical effect of arrest rules in CMSU: they simply do not work.

As was mentioned above, Ukraine is a party to Maritime liens convention. The provisions of the convention were incorporated into Art. 358 et. seq. of CMSU. Nevertheless, existence of a maritime lien on the ship is not taken into account by Ukrainian courts when decreeing an arrest, as general procedural rules of Ukraine do not contain references to provisions on maritime liens.

To assess the possibilities of arrest of ships in Ukraine, general procedural legislation of Ukraine must be used. There are two possible instances and two possible sets of procedural rules, which can be used to decree arrest of a ship, before the basis of enforcement of claim is obtained:

1. General court, based on procedural rules of Code of Civil Procedure of Ukraine of 18.03.2004 No. 1618-IV (hereinafter – CCPU).
2. Economic court, based on procedural rules of Code of Economic Procedure of Ukraine of 06.11.1991 No. 1798-XII (hereinafter CEPU).

## 4.2 Jurisdiction

As was already mentioned above, Ukrainian courts have a right to grant arrest when they have jurisdiction to decide the underlying claim on the merits.

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<sup>42</sup> Mallyayev (2006)

<sup>43</sup> Ibid



In case, when a ship, arrest of which is sought, flying Ukrainian flag, jurisdiction of general or economic court will be usually present. According to Art.32 of CMSU, ships, which fly Ukrainian flag must be owned (or bareboat-chartered) by state, natural persons-citizens of Ukraine or legal entities, founded in Ukraine only by Ukrainian owners. Therefore the defendant (owner of the ship) will usually be domiciled in Ukraine and in such case the claim can be filed with any court in Ukraine in the place of domicile of the defendant (Art. 109 of CCPU, Art. 15 of CEPU).

The problems arise, when the defendant is not Ukrainian and/or does not have a place of domicile in Ukraine. Such situations are common when arrest is sought of a ship, flying a foreign flag. In this case jurisdiction of general or economic court on the merits is established by special jurisdiction provisions of CCPU (regarding general courts), CEPU (regarding economic courts), as well as of Law of Ukraine On international private law No.1618-IV of 18.03.2004 (hereinafter – Law on international private law), which contains the rules of jurisdiction of Ukrainian courts (both general and economic) in cases with foreign element (i.e. when the defendant is foreign).

According to the mentioned acts, Ukrainian courts (general or economic) will have jurisdiction on the merits in the following cases<sup>44</sup>:

1. If the parties to the dispute have chosen Ukrainian court as a dispute resolution venue (Art. 76 (1) of Law On international private law). General or economic court will have a jurisdiction in such case. Not long ago, Supreme Economic Court of Ukraine (court of cassation instance in the system of economic courts, hereinafter – SECU) refused to recognize this as a ground for jurisdiction of economic courts in disputes with foreign element, as general jurisdiction rules in CEPU do not stipulate it<sup>45</sup>. Though the Supreme Court of Ukraine (SCU), which has a right to overrule decisions and rulings of SECU in accordance with Art.111-14 of CEPU and is the highest judicial body in the system of

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<sup>44</sup> Mallayev (2006)

<sup>45</sup> SECU Explanation of 31.05.2002, SECU Rulings of 27.02.2007 and of 20.03.2007

courts of general jurisdiction has recently changed this position<sup>46</sup>. According to the position of SCU, Art. 76 of Law On international private law can establish jurisdiction for economic courts and they do not have a right to refuse the case, if the parties have chosen Ukrainian court as a dispute resolution venue. In my opinion, the same goes for general courts – their jurisdiction also can be established by Article 76 of Law On international private law. My view is that the position of SCU is the right one, as provisions of Law On international private law constitute *lex specialis* in relation to general procedural rules of Ukraine, when the dispute has a foreign element, and therefore have priority upon general provisions of CCPU and CEPU.

2. If there are several defendants, any claims if one of defendants is domiciled in Ukraine (Art.15 (3) of CEPU, Art.113 of CCPU). General or economic court in the district of domicile of defendant will have jurisdiction.

3. Claims regarding possession, title or ownership of a ship or a share in a ship (Art.16 (2) of CEPU). Economic court in the district in Ukraine where the ship is situated will have exclusive jurisdiction.

4. Claims arising out of contracts of employment with ship's crew if a claimant is domiciled in Ukraine (Art.110 (1) of CCPU). General court in the place of domicile of claimant will have jurisdiction.

5. Claims arising out of collisions and compensation for salvage (Art.110 (11) of CCPU). General court of the place in Ukraine where the ship is situated will have jurisdiction.

6. Claims arising out of loss of life or personal injury to a person who is domiciled in Ukraine or if the accident took place in Ukraine (Art.110 (3) of CCPU, Art.76 (3),(5) of Law on international private law). General court in the place of domicile of claimant or in the place of accident will have jurisdiction.

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<sup>46</sup> See SCU Rulings of 22.05.2007 and of 17.04.2007.

7. Claims arising out of damage caused in Ukraine to property of private persons or legal entities as a result of operation of a ship (Art.110 (6) of CCPU), Art.76 (3) of Law On international private law). General court in the place where damage was caused will have jurisdiction, if CCPU provisions are applied. Law On international private law can establish jurisdiction for economic court as well.

8. Claims arising out of any contract which has to be executed in Ukraine (Art.110 (8) of CCPU). General court in the place of execution will have jurisdiction.

9. Any claims if the debtor owns any movable or real property, which can be seized in the process of execution of judgment, that is located in Ukraine or if the foreign debtor has a representation office or affiliated company in Ukraine (Art.76 (2) of Law On international private law). This is a very important provision, which practically states, that in cases involving a foreign element, as soon as the ship (property) is in Ukraine and it is owned by debtor, Ukrainian courts will have jurisdiction to decide the case on its merits. It has to be mentioned, that not so long ago Ukrainian economic courts did not tend to apply provisions of Law on International private law to establish jurisdiction (see above in 1). As was mentioned above, such approach was changed by SCU and now is clearly accepted by SECU in Ruling of 18.03.2008. The Ruling related to the case of arrest of a foreign ship REEF in Ukrainian port to secure a debt in connection with a contract of purchase and sale of the named ship. SECU provided that presence of the vessel, owned by a foreign debtor in Ukrainian port provided a ground for jurisdiction of Ukrainian economic court in accordance with Art. 76 (2) of Law On international private law. The named Ruling of CEPU is clearly progressive, providing more favorable conditions of arrest of foreign ships in Ukraine. Though it must be borne in mind, that Ukraine is a civil law country, where precedents do not have a binding force. Therefore the named Ruling can not guarantee analogous application of the provisions of Law On international private law by all economic courts of first instance (not speaking of general courts). Though such application now seems to be very probable.

#### 4.3 Which ships can be arrested. Arrest of sister ships

According to general provisions on arrest of property in CCPU (Art. 152) and CEPU (Art. 43-2, Art. 67), objects of arrest can only be property, owned by a debtor. Therefore it is not possible to arrest a ship, which is not owned by the debtor (though Article 43 of CMSU provides, that a bareboat chartered vessel can be arrested if the bareboat charterer is liable for the claim, but provisions of CMSU, as was shown above, are not used by Ukrainian courts). In this connection, other ships (and any other property), owned by a debtor can be arrested.

#### 4.4 Procedural aspects of decreeing arrest

Ukrainian legislation does not contain an exact definition of arrest of property, but out of general court practice the following definition can be given: arrest of property is a preliminary prohibition to dispose of property (or financial means) until the decision regarding the status of such property is taken (by court or other competent authority).

As can be seen from above, a claim regarding arrest of ships, depending on the jurisdiction ground can be filed either to a general court (typically – claims from natural persons, like injured seamen etc.) or to an economic court (typically – claims from legal entities). Different sets of procedural rules (CCPU or CEPU) will be applicable, depending on in which court arrest is sought.

Arrest of a ship (and any other property) can be decreed as a *measure of securing a claim*, and as a pre-trial *measure of restraint*. Arrest as a *measure of securing a claim* can be decreed by general or economic court. Procedural rules on its application are contained in CCPU. CEPU stipulates arrest as a *measure of securing a claim*, but does not contain specific procedural rules; therefore rules of CCPU are used based on the principle of

analogy. Arrest as a *measure of restraint* can be decreed only by an economic court under the procedural rules of CEPU.

The principle difference between these two measures is the following:

Arrest as a measure of securing a claim is not a pre-trial measure and can be applied at any stage of the proceedings on the claim (Art. 151 (3) of CCPU, Art. 67 of CEPU). This means, that arrest application can be filed to general or economic court *not earlier than together with the claim*. This creates several problems with a view to arrest of ships. The first problem is the timeframes – general court is obliged to take a decision on acceptance of the claim within 10 days after receiving the application (Art. 122 (3) of CCPU); in the economic court this period is 5 days (Art. 64 of CEPU). Decision regarding application of a measure of securing a claim is taken at the same day, when the application is received, provided that the claim is accepted. Therefore, the claimant can be lucky, if the judge opens proceedings regarding the claim without delay. But in the worst case, the claimant would have to wait for 10 (5) days before the proceedings are opened and the arrest decree is passed. It is understood, that during this time the ship, arrest of which is sought, can simply sail away from Ukrainian port. The second problem is that the claim will not be accepted by the judge if the court has no jurisdiction or can be returned, if the formal requirements are not met. This can make arrest impossible or make the procedure even longer.

Arrest as a pre-trial measure of restraint is much more favorable for arrest of ships. Firstly, it can be decreed by an economic court *before* the underlying claim is filed. Secondly, arrest must be decreed by the economic court within 2 *days* from the date of application (Art. 43-4(1) of CEPU). The underlying claim must be filed within 10 *days* after the arrest is decreed (Art. 43-3 of CEPU), and if the claim is accepted, measure of restraint becomes a measure of securing a claim with all legal consequences. If the claim is not filed within this period or not accepted by the court on jurisdictional or formal grounds, the arrest can be stopped (Art. 43-9 of CEPU). Mentioned rules of CEPU create a possibility for a potential claimant to arrest a ship, even if the economic court does not have a jurisdiction

with respect to the underlying claim. In such case creditor has at least 10 days, before the underlying claim must be filed, to convince the debtor to pay. But the claimant has to remember strict liability for damages to the defendant, caused by arrest (see below).

CCPU and CEPU stipulate a number of legal requirements and conditions, applicable both to measures of securing a claim and to measures of restraint:

1. Most important is the requirement of “arrest ground”, which can not be avoided under Ukrainian legislation. The claimant has a burden of proof that if the arrest is not decreed, his rights will be violated or that the decision of the court on the underlying claim will be impossible/difficult to execute. It is always in the discretion of the court whether to accept the arrest ground or not.
2. The court can require the claimant/potential claimant to post a security for potential damages to the defendant. The court defines the sum of security to be transferred to a deposit account of the court. It must be mentioned, that in practice it does not happen often – the better evidences presented to the court, the better chances to avoid the payment of security<sup>47</sup>.
3. It is in the discretion of the court to decide, whether the arrest as a measure of restraint should be granted *ex parte* and the potential claimant has a burden to prove such necessity.
4. The measure of securing a claim must be proportionate to the underlying claim (Art. 152 (3) of CCPU). It is in the discretion of the court to decide, whether the measure sought is proportionate. Arrest of property can be refused if the value of property, arrest of which is sought, is much bigger than the size of the underlying claim. Therefore a ship can hardly be arrested if the size of claim is not significant. Moreover, the court, in its discretion, can decree a partial securing of a claim.

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<sup>47</sup> Mallayev (2006)

5. Claimant/potential claimant is strictly liable for the damages, incurred by defendant in connection with arrest if the arrest is stopped, the underlying claim is not accepted or the decision on it is taken not in favor of claimant.

Arrest is subject to immediate execution according to the general provisions of Ukrainian law. According to the Law of Ukraine “On execution proceedings” of 21.04.2009 No.606-XIV, arrest of property can be executed if the property is found within the district of a specific execution officer in Ukraine (Art. 20). Therefore the ship must be in Ukrainian port in order to make execution possible.

The basic effect of arrest of a ship is that defendant loses his right to dispose of it or use it in any way during the time, the claim exists or until the decision on the underlying claim is taken.

#### 4.5 Problematic issues

As can be seen from the abovementioned, rules of arrest on ships in Ukraine are far from being perfect. Provisions of CMSU on arrest of ships do not have any practical effect. This creates a long list of problems, facing claimants and defendants in connection with ship arrests in Ukraine, not only when the ship is flying foreign flag, but also when the ship is Ukrainian, among which can be named the following:

1. Non-application by Ukrainian judges of rules on arrest of ships in CMSU even with respect to Ukrainian ships, to which arrest rules in CMSU clearly apply (Art. 14(1) of CMSU). In my opinion, this does not appear to be a diligent practice of Ukrainian courts. Courts are obliged to use special rules of CMSU (as they constitute *lex specialis* with respect to general procedural rules and have to prevail) and thus only arrest Ukrainian ships on the basis of a maritime claim, as Art. 42 of CMSU expressly provides, that arrest of ships can be effected *only* to secure maritime claims. But, unfortunately, court practice shows, that provisions of CMSU are simply ignored by Ukrainian courts. This can be

illustrated by SECU Ruling of 22.03.2007. In this case SECU in a cassation procedure has considered a ruling of the Appellate economic court, which confirmed a decision of the District economic court regarding arrest of the ship “Vitaliy Bainov”, flying Ukrainian flag, as a measure of securing a claim. The defendant argued that the court violated Art. 42 of CMSU, as the claimant did not provide, that he had a maritime claim against the defendant. Surprisingly enough, this argument, expressly stated in the application to SECU, was simply ignored by the court. SECU in its ruling stated, that arrest was conducted in accordance with general procedural rules of CEPU and thus was lawful.

Such position of the courts is not acceptable, but predictable, as norms of CMSU do not contain provisions on the arrest procedure, and CEPU and CCPU do not have any references to CMSU in parts, dealing with arrest.

2. Regarding arrest of foreign ships, a significant problem is the absence of clear jurisdiction rules. Claimant, who wishes to arrest a ship in Ukraine must search through the jungle of ambiguous and unclear Ukrainian legislation in order to find out, where to file a claim in order to arrest a ship. The conservative approach of Ukrainian judges towards application of jurisdiction rules leads to the situation, where the claimant has to merely hope, that a particular judge will accept a claim and thus grant an arrest. Of course, there is always a possibility to appeal the decree or decision, then reach cassation instance or SCU and finally prove the right choice of jurisdiction. But this can only give a moral satisfaction to the claimant – long months may pass before a final decision can be reached, and during this time a ship may be anywhere in the world. Such situation creates a “fruitful soil” for corruption within the Ukrainian judicial system: some claimants (or their lawyers) use their personal connections to judges in order to arrest ships, as this in many cases can be the only way.

3. Unsatisfactory procedural timeframes for decreeing arrest. As was shown above, only application of arrest as a measure of restraint in economic court secures fast decreeing of arrest. When the claim is filed to general court the timeframes are clearly unacceptable.



4. Ukrainian courts have a vast scope of discretion – it is always up to the court, whether to decree arrest or not.

5. Ship can be arrested for any type of claim. This creates a commercial nightmare for debtors, as when they send their ships to Ukrainian ports, they can not be sure, that they will not be arrested. This obviously influences general maritime commerce – foreign ships feel unsafe in Ukrainian waters.

All the abovementioned problems have an extremely negative impact on the general state of shipping in Ukraine, as well as on its reputation as a maritime country. It is obvious, that the existing situation in Ukrainian law must be changed by the legislators as soon as possible.

## **5 Rule B Attachment**

### **5.1 Legislative basis and essence of Rule B Attachment**

The legislative basis of a Rule B Attachment is found in US federal law, namely in the Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. Rule B of the named Supplemental Rules is called “In Personam Actions: Attachment and Garnishment” (hereinafter – Rule B).

The essence of Rule B Attachment is, that subject to satisfaction of all conditions of application of Rule B, the claimant can attach the property of a defendant in order to secure the claim, as well as obtain personal jurisdiction over the defendant through his property<sup>48</sup> and/or to satisfy outstanding judgments. Claimant and defendant can be from any countries and they do not need to have any connection to US.

### **5.2 Conditions of applying Rule B Attachment**

There are the following conditions of application of Rule B Attachment, established by the text of Rule B and supplemented by the US Second Circuit Court of Appeals<sup>49</sup> (hereinafter

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<sup>48</sup> Rule B Attachment is of interest to this thesis with a view of possibility to attach Electronic Funds Transfers (EFTs). As attachment of EFTs is in majority cases done in the state of New York (all international U.S. dollar transfers are processed by intermediary banks in the United States, mainly in New York City), the analysis of the cases and state legislation in connection with Rule B will be limited to the laws of the state of New York and cases, decided by district courts of four districts of New York (especially of Southern District of New York (SDNY), which covers Manhattan) and the Court of Appeals for the Second Circuit.

<sup>49</sup> The United States Court of Appeals for the Second Circuit (in case citations, 2d Cir.) is one of the thirteen United States Courts of Appeals. Its territory comprises the states of Connecticut, New York, and Vermont, and it has appellate jurisdiction over the four District Courts of New York and District Courts of Connecticut and Vermont.

– the Second Circuit) decision in *Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd.*, (2d Cir. July 2006):

1. A claimant has to have a valid *prima facie* claim against the defendant. Moreover, the defendant *must be personally liable for the claim*.

2. The claim must be an admiralty claim. US statutory law does not contain a specific list of maritime claims, as it is the case in many civil law countries (i.e. Norway or Ukraine). In addition, the U.S. is neither a party to the Brussels convention. Therefore, defining of a claim as being admiralty has been done by the courts.

The claim can be considered as being maritime if the admiralty jurisdiction exists under title 28 U.S. Code § 1333<sup>50</sup>. In US law admiralty jurisdiction can arise out of contract and out of tort.

The case law regarding the distinction between maritime and non-maritime contracts was quite unclear and the U.S. Supreme Court defined, in *Norfolk Southern Railway Company v. James N. Kirby Pty, Ltd., U.S. (2004)*, the criterion for determining a contract as being maritime. The Supreme Court stated that the definition of a contract as maritime does not depend on ship's involving in the dispute or on the place of the contract's formation or performance. Instead, the nature and character of the contract must be taken into account, and the core criterion is “whether it has reference to maritime service or maritime transactions.”

The Second Circuit in *Folksamerica Reinsurance Co v Clean Water of New York Inc* (2d Cir. 2005) interpreted the decision in *Norfolk* as establishing a requirement that “the principal objective of the contract is maritime commerce”<sup>51</sup>.

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<sup>50</sup> Winter Storm

<sup>51</sup> Folksamerica

There are important exceptions to this general rule in US law. Contracts with respect to building a vessel or supplying materials for building a vessel do not constitute a maritime contract (*People's Ferry Co. v. Beers*, U.S. (1857)<sup>52</sup>.

Moreover, it has long been the general rule under US law that the sale and purchase of a ship does not belong to admiralty<sup>53</sup>. However, recently, Judge Scheindlin in *Kalafrana Shipping Ltd v Sea Gull Shipping Co Ltd* (S.D.N.Y., Oct. 4, 2008), held that as vessels are central to maritime commerce, claims arising from contracts for their sale are maritime claims<sup>54</sup>. Though *Kalafrana* is not binding authority, its decision must be taken into account by all, seeking Rule B attachment in New York. Currently, several cases are on appeal to the Second Circuit regarding this issue of the law<sup>55</sup>.

With respect to admiralty jurisdiction, which arises out of tort, its scope is defined by Admiralty Extension Act, 46 U.S.C. App. §740, “the admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury [. . .] caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land”<sup>56</sup>.

Moreover, in *Sisson v. Ruby*, 497 U.S. (1990) the Supreme Court has held that “the activity that caused the tort has to have a potentially disruptive effect on maritime commerce, and the general character of the activity that gave rise to the incident must show a significant relationship to traditional maritime activity”<sup>57</sup>.

In any case, when a foreign claimant seeks application of Rule B in the US, existing court practice must be studied and in case of any doubts with respect to whether a claim can be considered maritime, a consultation with US lawyers can be advised.

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<sup>52</sup> White (2007)

<sup>53</sup> Ada, Chalos (28.08.2009)

<sup>54</sup> Sierra (2008)

<sup>55</sup> Chalos (28.08.2009)

<sup>56</sup> White (2007)

<sup>57</sup> Ibid

3. The property, which is sought by attachment, must be present in the district of the court that issues the Order of Attachment, or will soon be present in that district. The property does not need to be maritime in nature and it does not have to have any connection to the claim<sup>58</sup>. In practice, most judges simply accept a statement that the “defendant has or will shortly have” property in the jurisdiction as sufficient to meet the express requirement of Rule B. Though there are certain judges that require a more specific showing such as evidence of an ongoing banking relationship, pending fixtures that call for payment in US dollars, etc<sup>59</sup>.

4. The defendant must not be found within the district of the court, where the action is commenced. This requirement is settled in the very text of Rule B, though it does not define “found within the district”. The Second Circuit has interpreted this provision by establishing in *Seawind Compania, S.A. v. Crescent Line, Inc.*, (2d Cir. 1963) “a two-prong test” (“the Seawind Test”)<sup>60</sup>. According to this test, the defendant is considered to be “found within the district” if he can be found there: a) in terms of jurisdiction and b) for service of process. The first prong of the test usually was interpreted in the following way: “the defendant must be engaged in sufficient activity in the district or must have sufficient contacts with the district to permit the court to exercise in personam jurisdiction over the defendant”<sup>61</sup>. Judges interpreted differently what should be considered as sufficient activity or contracts, but mere registration often was not considered enough. The second prong is defined by Rule 4(d) of the Federal Rules of Civil Procedure, which provides, that service upon a corporation may properly be effected by service upon “an officer, a managing or general agent, or [...] any other agent authorized by appointment or by law to receive service of process.”<sup>62</sup> Both requirements have to be satisfied in order for the defendant considered to be “found” within the district, thus, it is not possible to avoid attachment merely by appointing an agent in the district for service of process. The test of

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<sup>58</sup> Hohenstein (2008) p. 541

<sup>59</sup> Chalos. (9.08.2009).

<sup>60</sup> STX Panocean

<sup>61</sup> Integrated Container

<sup>62</sup> Seawind

presence is applied at the time of the attachment application; therefore it is not possible to avoid attachment by establishing presence within the district after attachment was effected<sup>63</sup>.

Recently, the Second Circuit expounded upon the Seawind Test in its decision in *STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Ltd.* (March 19, 2009). In this case the court found, that “amenability to suit, rather than a party’s economic and physical activities in the district at issue, is the touchstone of the first prong of the *Seawind* Test”. The court used district court’s reasoning in *Integrated Container* and found, that a defendant’s registration under New York Business Corporation Law (NYBCL) § 1304 within the New York Department of State was sufficient to satisfy not only the first prong of Seawind test, but also the second (service of process requirement), as NYBCL § 1304 also sets requirement of designation of the secretary of state as company’s agent upon whom process against the company may be served. Thus, it is unnecessary for a defendant to actually conduct regular business activity in New York in order “to be found” there.

It can be concluded, that now mere registration of a company within the New York Department of State under NYBCL § 1304 and appointment of an agent seems to be sufficient to avoid the application of Rule B attachment in New York.

##### 5. There is no statutory or general maritime law prohibition to the attachment

It must be underlined, that according to the decision in *Aqua Stoli*, the claimant does not have an obligation to provide a proof, that security in a form of attachment is necessary<sup>64</sup>. Mere satisfying of the abovementioned criteria makes Rule B attachment possible. Thus, there is no requirement to “attachment ground” (in contrast to the requirement of “arrest ground” in case of arrest of ships in Norway and Ukraine).

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<sup>63</sup> Chalos (2008)

<sup>64</sup> Cardozo (2006)

It is necessary to add, that Rule B Attachment can be used to secure a claim litigated anywhere in the world. The Second Circuit addressed this issue lately in *Consub Delaware LLC v Schahin Engenharia Limitada* (2d Cir., Sept. 23, 2008). The court decided, that existence of a jurisdiction clause, which gives exclusive jurisdiction to English courts in agreement between the creditor and debtor does not preclude pre-trial application of Rule B attachment in the US. In such case US court will retain jurisdiction to enforce an obtained judgment/award against the attached property<sup>65</sup>.

### 5.3 What property can be attached

#### 5.3.1 General

Generally, any type of property belonging to the target debtor, which can be found within the district of the court, can be subject to Rule B attachment. The property does not need to be connected with the underlying claim. It can be tangible or intangible property (Rule B (1)). Subject to attachment can be a sister ship, money on the defendant's bank account, as well as promissory notes, arbitration awards and Clubs Letter of Undertaking<sup>66</sup>. Ship itself can be attached under Rule B and there is no requirement of existence of a lien on it<sup>67</sup>.

As it was mentioned above, Rule B jurisdiction is "in personam", therefore, if the defendant appears in the action, the judgement is enforceable against all defendant's property. To the contrary, if the defendant does not appear to take part in the procedure, the judgement of the court is only enforceable with respect to the value of the property attached. If the defendant makes limited appearance only for the purpose of seeking to vacate the attachment, he does not subject all of his assets to the jurisdiction of the court<sup>68</sup>.

#### 5.3.2 Attachment of Electronic Funds Transfers

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<sup>65</sup> Steamship (2001)

<sup>66</sup> Anderson (2008)

<sup>67</sup> White (2007)

<sup>68</sup> Chalos (2008)

Of particular significance for the practical role of Rule B Attachment, which made it an extremely popular remedy nowadays is the possibility to attach EFTs. EFTs, otherwise known as wire transfers, are “transfers of money initiated through an electronic terminal or central computer, with the authorization of a bank or other financial institution to debit or credit an account. If the originating bank and the receiving bank are not members of the same wire transfer system, which is generally the case with international transfers, the funds must be sent through one or more intermediary banks”<sup>69</sup>.

In practice, international transfers of funds require clearing of funds in US dollars through New York clearing house banks (as the largest banks are situated in Manhattan, NY), even when the payer and payee banks are both located outside the US<sup>70</sup>. Therefore, when a defendant is, for example, a Ukrainian company which makes payment in US dollars to Norwegian company, the chances are very high, that the funds will travel via a clearing house bank in New York.

Crucial decision in the context of EFTs attachment is found in *Winter Storm Shipping, Ltd. v. TPI*, (2<sup>nd</sup> Cir. 2002). In *Winter Storm* it was held that an EFT at an intermediary bank was the property of the defendant (sender of the funds) and could be attached pursuant to Rule B by a creditor, having a maritime claim towards the defendant. This decision was the first which allowed Rule B attachment of EFTs and due to its significant impact, it is considered necessary to give a short brief of the key legal issues, discussed in this case.

Firstly, the Second Circuit held that Rule B attachment of EFTs was constitutional and in compliance with principles of due process in US, as, firstly, Rule E(4)(f)<sup>71</sup> provides the defendant the possibility to question the correctness of the application of attachment, and, secondly, clearing of EFTs through banks in NY was considered “a wholly foreseeable arrangement”<sup>72</sup>. Therefore it was held, that “when an individual or company transfers funds by means of an EFT, those funds may be subjected to maritime attachment in the hands of

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<sup>69</sup> Anderson (2008)

<sup>70</sup> Chalos (28.08.2009)

<sup>71</sup> Rule E (4) (f) of Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions to Federal Rules of Civil Procedure

<sup>72</sup> *Winter Storm*



an intermediary bank without violating constitutional due process, whether or not the initiator of the transfer knew which intermediary bank would be used to effect it.”<sup>73</sup>

The second matter, decided by the Second Circuit, was whether EFTs could be considered “tangible and intangible personal property” of the defendant within the meaning of Rule B. The Second Circuit based its reasoning on the case *United States v. Daccarett*, (2d Cir. 1993) which involved a civil forfeiture action under federal drug laws. *Daccarett* holds that “an EFT while it takes the form of a bank credit at an intermediary bank is clearly seizable res under the forfeiture statutes.”<sup>74</sup> Notwithstanding the facts, that *Daccarett* was a drug case (and not an admiralty case) or that in *Daccarett* the government used Admiralty Rule C (and not Rule B) to arrest the funds, the court concluded, that “Daccarett’s holding that EFTs are subject to Admiralty Rule C arrest furnishes authority for the conclusion that they are equally subject to Admiralty Rule B attachment”<sup>75</sup>.

The third matter, decided by the Second Circuit was whether consideration of EFTs as “property” of the defendant must be decided in accordance with state or federal law. The Court discussed the principle established by the Second Circuit in *Reibor International Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.*, (2d Cir. 1985, which indicates, that while federal law generally governs questions as to the validity of Rule B attachments, state law may be borrowed if there is no federal admiralty law in point on the particular question presented<sup>76</sup>. In accordance with the state law of New York (in particular, in accordance with the provisions of Uniform Commercial Code, adopted in New York), EFTs are not considered property of either party while in intermediary bank and, therefore, they can not be attached until the transfer is finished. However, in *Winter Storm* it was held, that Admiralty Rule B preempts the NY state law, as in US maritime law is designated by the Constitution as *being the subject of Federal (US) Law*. The court underlined, that even if it is permissible in general to refer to state law in specific circumstances, in the situation with

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<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Ibid

<sup>76</sup> Ibid

Rule B attachment in the case it would be “working prejudice to a characteristic feature of the general maritime law”<sup>77</sup> and, therefore, application of NY state law was not appropriate.

Opponents of *Winter Storm* keep arguing, that the ability to attach EFTs under Rule B negatively influences the federal clearing system and financial markets in the US and there are many who believe, that it is just a matter of time before the *Winter Storm* decision will be overruled.

*Winter Storm* has been followed by a number of different decisions, which in one way or another influenced the development of Rule B attachment of EFTs.

The first case, worth mentioning in is the decision by the Second Circuit in *Aqua Stoli*. In footnote 6 of *Aqua Stoli* the court states, that “the correctness of the decision of the Second Circuit in *Winter Storm* seems open to question, especially its reliance on *Daccarett*, to hold that EFTs are property of the sender of an EFT”. The court underlines, that “because *Daccarett* was a forfeiture case, its holding that EFTs are attachable assets does not answer the question of *whose* assets they are while in transit”. The court states, that “in the absence of a federal rule, it would normally look to state law, which in this case would be the New York codification of the Uniform Commercial Code”<sup>78</sup>. As was mentioned above, under NY state law EFT could not be attached because EFTs are considered property of neither the sender nor the beneficiary while present in an intermediary bank.

Practically, the footnote gives to the Second Circuit an opportunity to revisit the correctness of the *Winter Storm* decision in future. If the stated above position were adopted by the Second Circuit, it would practically deprive Rule B Attachment of its unique power, as EFTs will no longer be subject to attachment.

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<sup>77</sup> Ibid

<sup>78</sup> *Aqua Stoli*

This issue was addressed by the Second Circuit in *Consub Delaware*. In this case the defendant relied on footnote 6 of *Aqua Stoli* decision, arguing, that attachment of EFTs must be subject to NY state law and, thus, is not permissible. With respect to the footnote 6 of *Aqua Stoli*, the court stated, that it acknowledged that federal law – i.e. Rule B – governs the question of who owns the funds in an EFT as they pass through an intermediary bank, as it stated “...in the absence of a federal rule (i.e. Rule B), it would normally look to state law.” Moreover, the court underlined, that *Winter Storm* remains to be a valid decision and it can be overruled only:

- 1) by Supreme Court decision;
- 2) by decision of en banc panel of the Second Circuit (a decision made by all the Circuit Judges of the Second Circuit).

Thus, at the moment *Winter Storm* remains a valid decision, granting to the claimants all over the world a unique possibility of attaching EFTs.

It can be added, that *Winter Storm* recognized EFTs coming *from* the debtor as funds, which can be attached prior to Rule B. What about if the debtor is the intended beneficiary of the funds (i.e. money coming *to* debtor)? This issue has not been yet addressed by the Second Circuit, though was considered by the District Court in *Seamar Shipping v. Kremikovtzi Trade, 2006 (S.D.N.Y., Nov. 17, 2006)*. In this case Judge Rakoff held that EFTs can not be subject to attachment while in the intermediary bank, if the debtor is intended beneficiary of the funds, as they have not yet reached the debtor and thus he does not yet have a property interest in them. In my opinion, such position seems to be reasonable but not all District Judges seem to follow it<sup>79</sup>. In fact, no other reported decisions adopt Judge Rakoff’s analysis; however several District Judges have started to limit their Orders of Attachment to only those EFTs which are originated by the target defendant<sup>80</sup>. A decision by the Second Circuit on this matter has to be awaited.

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<sup>79</sup> Harter (2006)

<sup>80</sup> Chalos (28.08.2009)

## 5.4 Procedural issues

The procedure of effecting Rule B Attachment, according to the very text of Rule B, is the following.

Provided, that all requirements for application of Rule B Attachment are satisfied, claimant must file to the district court (in case of attachment of EFTs, most likely it will be Court of SDNY) a verified complaint containing a prayer for process to attach the defendant's tangible or intangible personal property – up to the amount sued for – in the hands of garnishees named in the process (in case of EFTs, a garnishee will be a bank). Together with the complaint, an affidavit must be filed, stating that, to the affiant's knowledge, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The Clerk may issue supplemental process enforcing the court's order upon application without further court order.

Plaintiff can avoid the pre-attachment review by certifying exigent circumstances and show, that exigent circumstances make court review impracticable (when the judge is unavailable or when the ship or other property is about to depart from the jurisdiction)<sup>81</sup>. In such cases, the Clerk of Court shall conduct the review and issue the order in the place of a District Judge<sup>82</sup>.

According to Rule E 4(f) "Procedure for Release From Arrest or Attachment": "whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted". In this regard, additional grounds for vacating Rule B Attachment), settled by decision in *Aqua Stoli* must be mentioned. By decision in *Aqua Stoli* the court has held, that a district court may vacate the attachment ("on equitable grounds") if the defendant shows at the Rule E hearing that: 1) the defendant

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<sup>81</sup> Anderson (2008)

<sup>82</sup> White (2007)

is subject to suit in a convenient adjacent jurisdiction; 2) the plaintiff could obtain *in personam* jurisdiction over the defendant in the district where the plaintiff is located; or 3) the plaintiff has already obtained sufficient security for the potential judgment, by attachment or otherwise<sup>83</sup>.

It must be underlined, that the Rule B proceedings must be filed and handled by a Member of the bar of the United States District Court for the Southern District of NY (if the action is filed in SDNY). The initial filing must be by hand and contain an original signature. Thereafter, once the proceedings are opened, additional pleadings or documents can be filed through a special electronic case filing system, which can only be accessed by members of the bar. Foreign lawyers cannot take this action on their own behalf<sup>84</sup>. Therefore it is necessary for a foreign claimant to contact and give instructions to the lawyer in US (NY) in order to effect the procedure of Rule B Attachment.

It can be mentioned, that average costs of pursuing a Rule B in American law firms range between USD 3,000-USD 5,000 and filing fees are USD 350<sup>85</sup>.

## 5.5 Attachment of “after-acquired property” and practical issues of effecting Rule B Attachment of EFTs

As soon as the court’s order to attach EFTs is obtained, a representative of claimant (attorney etc.) must personally service the order of attachment to the bank, where, the claimant thinks, the money from the defendant will arrive in the nearest future (this bank must be specified in the order). A specific issue of attachment of “after-acquired property” must be addressed. As it can be understood, a claimant can hardly know precisely when exactly the money from the defendant will arrive at the bank in question. The best solution in this case would seem to instruct the bank to attach the funds from the defendant

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<sup>83</sup> Aqua Stoli

<sup>84</sup> Chalos (25.07.2009)

<sup>85</sup> Ibid.

whenever they arrive there in future. But such solution does not seem to be possible under US law. The issue whether a Rule B attachment covers “after-acquired property,” that is, property of a defendant coming into the possession of a garnishee after service of process upon the garnishee, was addressed by the Second Circuit in *Reibor*. The court in *Reibor* came to the conclusion, that Rule B attachment does not cover “after acquired property”, and “the levy is absolutely void unless the garnishee has some property belonging to the defendant or owes the defendant a debt at the time the order is left with him.”<sup>86</sup> Taking into consideration the fact, that EFTs usually do not stay long in the intermediary bank, the only possible solution for the claimant seems to be serving the attachment in a continuous manner (say, every hour), hoping to “catch” the money while they are still in the bank. As it can take quite long time, before the money actually arrives, such a way of effecting service is incredibly impractical and can be quite costly.

Therefore, following the Winter Storm decision it became common practice to include in the orders of attachment language that made the order effective for 24 hours (often referred to as “wrap around service”). US judges tend to give the banks a choice whether to deem service effective for such time, or not. Moreover, the judges also give banks a possibility, after receiving initial service of the order of attachment personally, to accept “daily service” by electronic means (i.e. fax or email). Therefore it is enough to serve an attachment by sending an e-mail or fax once a day, in order to ensure, that the funds, if they arrive in the bank during that day, will be attached. It has to be underlined, that the most banks in New York nowadays accept “wrap around service”, as well as daily service by electronic means. A couple of banks do not accept it, requiring the order of attachment to be served in the “old-fashioned way”, i.e. in person and many times throughout the day<sup>87</sup>. It has to be stressed, that if the bank accepts the abovementioned services, the attachment will not be considered contrary to the principle in *Reibor*, as it will be deemed to be served at the time, when the bank (garnishee) actually holds EFTs, which will not be considered “after-acquired property” in such case.

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<sup>86</sup> Winter Storm

<sup>87</sup> Chalos (25.07.2009)

A recent decision of the District Court of SDNY has outlined a stricter interpretation of the case law governing Rule B. In *Cala Rosa Marine Co. Ltd. v. Sucres et Deneres Group* (S.D.N.Y. Feb. 4, 2009) Judge Scheindlin refused to grant a continuous service (leaving the decision to the banks) and refused to appoint a specific process server – instead requiring service via US Marshal (in contrast to a private process server) to serve the Rule B attachment. An appointment of the US Marshal makes a process of attachment much more costly and inconvenient for the plaintiff. Judge Scheindlin reasoned such decision by an enormous burden for US courts and banks, caused by Rule B attachment proceedings. This decision is not binding for other district judges (and it was not followed by other judges so far<sup>88</sup>), but clearly shows, that sometimes easiness of application of Rule B attachment can depend not only on a bank, willing or unwilling to accept “wrap around service”, but also on the Judge, who issued an order of attachment.

## 5.6 Effects of Rule B Attachment

Rule B attachment has the following core effects:

- a) the plaintiff can obtain personal jurisdiction over the defendant through his property (jurisdiction *quasi in rem*) in US courts<sup>89</sup>.
- b) it guarantees the satisfaction of claim, at least up to the value of the property that is restrained pursuant to the attachment order<sup>90</sup>.

## 5.7 The defendant's options

When the defendant has his property/funds attached subject to Rule B attachment, his business may be practically paralyzed, as he loses the ability to dispose of the attached property/funds. In such situation, the defendant has several options.

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<sup>88</sup> Chalos (09.08.2009)

<sup>89</sup> Murnane (2006)

<sup>90</sup> Ibid

a) The defendant can post security in order to lift the attachment order. According to Rule E, the parties can agree on the amount of security. In absence of such agreement, the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim. The Rule provides for a maximum of "twice the amount of the plaintiff's claim or the value of the property on due appraisal, whichever is smaller." P & I club letters of undertaking are frequently accepted as security, but the courts will not force a plaintiff to accept a letter of undertaking in lieu of a bond<sup>91</sup>.

b) The defendant can try to vacate the attachment in Rule E 4(f) proceedings (see above) on general or equitable grounds (Aqua Stoli, see above).

c) The defendant can file a counterclaim for wrongful attachment. In such case the defendant will have to prove, that attachment was pursued by claimant in bad faith<sup>92</sup>.

d) Pursuant to Rule E (7) the defendant, who posted a security in the original action, can file a counterclaim and seek countersecurity. If the defendant obtains an award of countersecurity and the plaintiff fails to post the ordered amount, the District Court will exercise its equitable discretion and vacate the original Order of Attachment and dismiss the case<sup>93</sup>.

## 5.8 Avoidance

According to a recent Second Circuit decision in STX Panocean, registration of a company within the New York Department of State under NYBCL § 1304 and appointment of an agent for the service of process seems to be sufficient to avoid the application of Rule B attachment in New York.

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<sup>91</sup> Chalos (2008)

<sup>92</sup> Gard News (2006)

<sup>93</sup> Chalos (28.08.2009)



Concerning attachment of EFT's, in order to avoid Rule B Attachment in NY banks, the payment can be made in such way, that clearing through NY banks will not be required (i.e. not in US dollars, but in Euro), though practicability of such way is questionable due to wide usage of US dollars as payment means in international shipping contracts.

## 6 Conclusions

### 6.1 Arrest of ships in Norway

The above description of the legal regime concerning arrest of ships in Norway shows, that Norway's participation in Brussels convention and quite clear and unambiguous provisions of local legislation makes arrest of ship in Norway a relatively simple procedure, available to claimants from all over the world. Any ship (Norwegian or foreign) can be arrested by any claimant (Norwegian or foreign) if the ship is or is expected to arrive in Norway. The procedure of granting arrest is fast, simple, in most of the cases dealt "ex parte" (without the defendant present) and relatively cheap. Of course, there are some important divergences from the rules of Brussels convention in Norwegian law, which do not exist in many other jurisdictions, like:

Additional requirement, except of claim being maritime, to the "arrest ground"<sup>94</sup>;

Impossibility to arrest a ship, if the person liable for the claim is not the owner<sup>95</sup>.

These divergences must be borne in mind by the creditors, wishing to arrest a ship in Norway, though it should always be remembered, that they are not applicable if the creditor has a claim, secured by a maritime lien.

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<sup>94</sup> See 2.2.1. above

<sup>95</sup> See 2.3.2. above.

## 6.2 Arrest of ships in Ukraine

As was shown in the above analysis, the existing legal regime of arrest of ships in Ukraine is far from being perfect. At the first sight, the described problems can be solved by accession of Ukraine to the Brussels convention, as in this case Ukraine will have an obligation to adjust its legislation correspondingly. Ukrainian non-accession to the Brussels convention was preconditioned by an attempt of Ukrainian government to protect state shipping companies (Black Sea Shipping Company, Azov Sea Shipping Company) from arrests of the state commercial vessels in foreign jurisdictions<sup>96</sup>. But this attempt appeared to be ineffective: many Ukrainian state vessels were anyway arrested in foreign jurisdictions. Moreover, nowadays, almost all Ukrainian state shipping companies are liquidated or are in the bankruptcy process<sup>97</sup>. Therefore the position of Ukrainian government, in my opinion, must be changed and one of the arrest conventions must be ratified, as this will bring only advantages to Ukraine as a developing maritime power.

Though mere accession to arrest conventions may not solve all procedural problems – similar problems with arrest of ships exist in Russian Federation (which has a very alike legal tradition with Ukraine), notwithstanding the fact, that the Brussels convention is ratified there<sup>98</sup>. In my opinion, a thorough revision of Ukrainian legislation must be made and many substantial changes introduced, as it can also prepare Ukraine to accession to one of the arrest conventions.

Some Ukrainian lawyers and legal theoreticians consider the arrest of ship, specified by provisions of CMSU a specific type of procedure, which must be separated from general rules of securing claims (or applying measures of restraint)<sup>99</sup>. I do not consider this separation to be reasonable, as in this case specific procedural arrest rules must be stipulated in CMSU, which can create more confusion to courts in process of their application. In my opinion, arrest of ships in Ukraine must be considered as a specific case of arrest of property, which must be decreed according to general procedural rules on arrest

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<sup>96</sup> Mallayev (2006)

<sup>97</sup> Ibid

<sup>98</sup> Ank (2003)

<sup>99</sup> Ibid

with special reservations regarding arrest of ships (like it is done in Norwegian law). Specific references to the provisions of CMSU regarding arrest of ships must be made in CEPU and CCPU, like this is perfectly done in Norwegian legislation (Art. § 32-3 (1) of NCPA) in order to make provisions of CMSU work. Moreover, changes must be made to other legislative acts of Ukraine, like the Law on execution, in order to provide a special status to ships.

Moreover, article 14(1) of CMSU must be changed to make rules on arrest of ships in CMSU applicable to foreign ships.

The number of legislative changes must be made with respect to jurisdiction rules. Some Ukrainian legal scholars in the sphere of maritime law, like O.Brylyov, are of opinion that Ukraine needs to establish a special judicial body – admiralty courts, in order to consider cases on arrest of ships and other maritime matters.<sup>100</sup> In my opinion, creation of admiralty courts does not appear to be reasonable. Admiralty courts are traditional for common law countries, though their presence in civil law countries (like Norway and Ukraine) does not seem to be common. Moreover, creation of an extra court in an already much complicated Ukrainian court system will only add ambiguity to deciding maritime cases, not taking into account, that this process is long and costly. My view is that Ukraine has to follow example of Norway – arrest of ships must be decided by courts of general jurisdiction, though substantial changes to Ukrainian legislation in this regard must be made. Firstly, a jurisdiction of one court (as now it is divided between general and economic courts) to decree arrest of ship must be established. The most reasonable in this case will be to give this authority exclusively to economic courts, as the procedure of applying arrest as a measure of restraint in CEPU is fast, can be decided ex parte, before the underlying claim is filed and seems more or less to correspond to arrest provisions in NCPA. In such cases the economic courts must be also given jurisdiction in cases, when the claimant is a natural person (i.e. seaman), as now such cases are considered by the general courts. Giving

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<sup>100</sup> Brylyov (2003)

authority to decree arrest of ships to one court will also after some time create court practice and the judges of this court will be more qualified to decide on arrest of ships.

Moreover, the changes to legislation must be made in order to allow the arrest of ship to give to a court, which decreed arrest, jurisdiction to decide claim on the merits (like it is done in Norway).

Existence of a maritime lien on a ship must be also taken into account and it might be reasonable to follow the Norwegian approach and allow arrest of ships, secured by maritime lien without necessary arrest ground. Maritime liens have to give possibility of arrest of ships also in cases, if the person, liable for a claim is not the owner (i.e. bareboat-charterer), as this is an internationally recognized practice, which stems from the very nature of a maritime lien.

In my opinion, all abovementioned changes to Ukrainian legislation are necessary in order to make the procedure for arrest of ships in Ukraine clear, transparent and predictable. This will make Ukraine a favorable jurisdiction for maritime claimants, defendants, as well give a necessary impulse to development of maritime law, what is absolutely crucial for Ukraine in order to occupy a worthy place among maritime powers in the world. Accession of Ukraine to the Brussels convention will also give Ukrainian ships all the privileges, enjoyed by the ships of countries-signatories to it, which will reduce the number of arrests of Ukrainian ships abroad. The mentioned matters were addressed by the legislators several times during the last decade, but the proposed changes to legislation are still not enacted by Ukrainian Parliament. It is difficult to find a reasonable explanation to such position, but I truly believe, that soon the importance of maritime industry for Ukraine will be understood by the legislators and the arrest rules will be amended.

### 6.3 Rule B attachment

As can be seen from the analysis above, Rule B attachment of EFTs can be applied by claimant anywhere in the world against a defendant anywhere in the world, to secure a claim litigated anywhere in the world.

Rule B attachment of EFTs has specific characteristics, which make it a good alternative to arrest of ship:

- Creditor does not have to search for any assets of the defendant, including ships – many shipping companies conduct international payments in US dollars on a regular basis;
- Attachment of EFTs is a good alternative, when the arrest of ship is not possible or difficult to perform (i.e. when ship is situated in jurisdiction, with not very clear rules on arrest of ships, like Ukraine);
- Creditor is not strictly liable for losses of the debtor, connected with attachment, in case the decision on the underlying claim is not in favor of creditor or if the court finds, that claim did not exist (negligence or fraud on the part of creditor must be proved, if the debtor files a counter-claim for wrongful attachment), therefore creditor does not run a substantial financial risk, when order of attachment is sought in good faith (both in Norway and Ukraine strict liability of the arrestor of the ship can take pace).
- There is no requirement to “attachment ground” (in contrast to existence of requirement to “arrest ground” both in Norway and Ukraine);
- Attachment in most cases is granted “ex parte” and often can be unexpected for the debtor, not familiar with the process.

Of course, possible complications, which can be faced by the claimant in the process of attaching EFTs must be taken into account, like position of a specific judge, which can make attachment more difficult (*Cala Rosa*), as well as the local regulations of a specific bank. Moreover, there is always a risk that the debtor will find out about the attachment proceedings and will not conduct payments in US dollars, making attachment impossible. Besides, sometimes it can be difficult to predict, how large will be the sum transferred from the debtor and thus the sum attached can be insufficient to cover the amount of claim. Notwithstanding these factors, Rule B attachment of EFTs remains a powerful and very effective alternative to ship arrest. And this is proved by enormous popularity of this remedy – nowadays from a third to a half of all cases in the US District Court for the SDNY are Rule B attachment matters and many attachments are sought almost every day<sup>101</sup>.

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<sup>101</sup> Chalos (9.08.2009)

## References

### List of Judgments/Decisions

#### Ukraine

Short name	Full name
SCU Ruling of 17.04.2007	Ruling of Supreme Court of Ukraine of 17.04.2007 No.6/165. Published: "Yurydychna praktyka. Court practice issue." No. 6 of 26.06.2007
SCU Ruling of 22.05.2007	Ruling of Supreme Court of Ukraine of 22.05.2007. Published: "Economic court practice. Court practice in economic disputes", No. 1 – 2, 2008
SECU Explanation of 31.05.2002	Explanation of Presidium of Supreme Economic Court of Ukraine of 31.05.2002 No.04-5/608
SECU Ruling of 27.02.2007	Ruling of Supreme Economic Court of Ukraine of 27.02.2007
SECU Ruling of 20.03.2007	Ruling of Supreme Economic Court of Ukraine of 20.03.2007 Published: "Economic court practice. Court practice in economic disputes", No. 1 – 2, 2008



SECU Ruling of 22.03.2007	Ruling of Supreme Economic Court of Ukraine of 22.03.2007 No. 9/361-IIH-06
---------------------------	--

SECU Ruling of 18.03.2008	Ruling of Supreme Economic Court of Ukraine of 18.03.2008 No. 9/338-07-9047
---------------------------	---

**USA**

Ada	The Ada (2d Cir. 1918).
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Aqua Stoli	Aqua Stoli Shipping Ltd. v. Gardner Smith Pty Ltd. (2d Cir., 2006)
------------	--

Cala Rosa	Cala Rosa Marine Co. Ltd. v. Suces et Deneres Group (S.D.N.Y., 2009)
-----------	--

Consub Delaware	Consub Delaware LLC v Schahin Engenharia Limitada (2d Cir., 2008)
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Dacarret	United States v. Daccarett, (2d Cir., 1993)
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Folksamerica	Folksamerica Reinsurance Co v Clean Water of New York Inc (2d Cir., 2005)
--------------	---

Integrated Container	Integrated Container Serv. Inc. v. Starlines Container Shipping Ltd., (S.D.N.Y., 1979)
----------------------	--

Kalafrana	Shipping Kalafrana Shipping Ltd v Sea Gull Shipping Co Ltd (S.D.N.Y., 2008)
-----------	---

Norfolk	Norfolk Southern Railway Company v. James N. Kirby Pty, Ltd., (U.S., 2004)
People's Ferry	People's Ferry Co. v. Beers (U.S., 1857)
Reibor	Reibor International Ltd. v. Cargo Carriers (KACZ-CO.) Ltd.,(2d Cir., 1985)
Seamar	Seamar Shipping v. Kremikovtzi Trade (S.D.N.Y., 2006)
Seawind	Seawind Compania, S.A. v. Crescent Line, Inc., (2d Cir., 1963)
Sisson v Ruby	Sisson v. Ruby (U.S., 1990)
STX Panocean	STX Panocean (UK) Co., Ltd. v. Glory Wealth Shipping Ltd. (2d Cir., 2009)
Winter Storm	Winter Storm Shipping, Ltd. v. TPI, (2 <sup>nd</sup> Cir., 2002)

## **Treaties/Statutes**

### **International treaties**

Brussels convention	International Convention Relating to the Arrest of Sea-Going Ships (Brussels, 1952)
Geneva convention	International Convention on the Arrest of Ships (Geneva, 1999)

Maritime liens convention	International Convention on Maritime Liens and Mortgages (Geneva, 1993)
Lugano convention	Convention on jurisdiction and enforcement of judgments in civil and commercial matters (Lugano, 1988)
<b>Norwegian legislation</b>	
NMC	Norwegian Maritime Code (Lov om sjøfarten) of 1994-06-24 No. 39
NCPA	Norwegian Civil Procedure Act (Lov om mekling og rettergang i sivile tvister) of 2005.06.17 No. 90
NECA	Norwegian Enforcement of Claims Act (Lov om tvangsfullbyrdelse) of 1992-06-26 No 86
NCSA	Norwegian Creditor's Seizure Act (Lov om fordringshavernes dekningsrett) of 8.06.1984 No. 59
<b>Ukrainian legislation</b>	
CMSU	Code of merchant shipping of Ukraine of 23.05.1995 No 176/95-BP
CCPU	Code of Civil Procedure of Ukraine of 18.03.2004 No. 1618-IV



### **English language books**

- Berlingieri (2006) Berlingieri, Francesco, *Arrest of ships: A commentary on the 1952 and 1999 arrest conventions*, 4<sup>th</sup> edition, London, 2006
- Jackson (2005) Jackson, D.C., *Enforcement of maritime claims*, 4<sup>th</sup> edition, London, Singapore, 2005
- Falkanger (2008) Falkanger, Thor; Bull, Hans Jacob and Brautaset, Lasse *Scandinavian maritime law*, 2<sup>nd</sup> edition, Oslo, 2008
- Smith (1997) Smith, Paul, *Ship arrest handbook*, London, Hong Kong, LLP 1997
- Tetley (1998) Tetley, William, *Maritime liens and claims*, 2<sup>nd</sup> edition, Montreal, 1998

### **Ukrainian language books**

- Shemyakin (2006) Shemyakin, A., *Maritime law*, Kharkov, 2006
- Brylyov (2005) Brylyov A.A. *Arrest of vessels on security of maritime claims (civil aspects)*. Thesis in candidacy for a degree in legal sciences. National Academy of Law, Odessa, 2005

### **Articles**

### **English language articles**

- Falkanger (2000) Falkanger, Thor, *Arrest of ships under Norwegian law*, SIMPLY, Scandinavian Institute of Maritime Law Yearbook 2000, p. 3-34
- Hohenstein (2008) Hohenstein, James; Morris, Francesca, *Maritime Attachment of a Company's Money in New York*, Pratt's Journal of Bankruptcy Law. September 2008. ALEXeSOLUTIONS, INC. p. 541
- Philip (1977) Philip, Allan, *Maritime Jurisdiction in the EEC*, Nordisk Tidsskrift for International Ret, Volume 46, Numbers 3-4, 1977 , pp. 113-122(10)

#### **Ukrainian language articles**

- Paliuk (2001) Paliuk, V, Brylyov, O Peculiarities of court arrest of a ship (cargo). Advocate, 2001, No. 1-2, p. 8-10.

#### **Internet articles**

- Anderson (2008) Anderson, Charles *Rule B Attachments and Electronic Funds Transfers – A Model for the New Electronic Age or e-Commerce Nightmare?:* Skuld North America, 2008.  
<http://www.skuld.com/upload/News%20and%20Publications/Publications/Beacon/Beacon%202008%20191/Rule%20B%20Attachments%20and%20Electronic%20Funds%20Transfers.pdf> [Visited August 2, 2009]

- Ank (2003) *Arrest of ships*, Law firm ANK, 2003  
<http://www.ank.odessa.ua/obzori/conf/const04.html>  
 [Visited July 17, 2009]
- Brylyov (2003) Brylyov, O. *Admiralty courts in Ukraine – to be or not to be*, 2003, <http://www.yur-gazeta.com/oarticle/218/>  
 [Visited July 18, 2009]
- Cardozo (2006) Cardozo, Camilo, *Arrest and attachment in US*. DLA Piper publications, 2006.  
<http://www.dlapiper.com/files/Publication/4c25253b-f526-45f0-854a-0000ffdc9bac/Presentation/PublicationAttachment/b52143ea-1c87-4245-a069-0439d81b55b0/Arrest%20and%20attachment%20an%20update.pdf> [Visited August 18, 2009]
- Chalos (2008) Chalos, George “*Rule B*” *Attachments Under The Supplemental Rules For Certain Admiralty And Maritime Claims – A Powerful, Ex Parte, Remedy*, 2008 <http://www.chaloslaw.com/rule-b.html> [Visited August 1, 2009]
- Gard News (2006) “*B*” *is for ... Rule B maritime attachments in the US*. Gard News 182, May/July 2006.  
[http://www.gard.no/gard/Publications/GardNews/RecentIssues/gn182/art\\_15.htm](http://www.gard.no/gard/Publications/GardNews/RecentIssues/gn182/art_15.htm) [Visited August 1, 2009]

- Harter (2006) Harter, Simon, *Bow Wave*, Issue 369, 2006  
<http://www.wavyline.com/current.php?issue=369>  
 [Visited August 5, 2009]
- Herlofsen (2006) Herlofsen, Frithjof *Ship arrest in Norway*, 2006  
<http://www.shiparrested.com/ship-arrest-in-norway-by-siril-steinsholt-visnes-vogt-viig-as.html> [Visited June 24, 2009]
- Mallayev (2006) Mallayev, Vagif *Ship Arrest in Ukraine*, 2006  
<http://www.shiparrested.com/ship-arrest-in-ukraine-by-vagif-mallayev-chechel-mallayev-partners-law-firm.html> [Visited July 13, 2009]
- Sierra (2008) Sierra, Juan, *Does this taste salty to you? US Rule B attachments in New York*, Ince & Co, Shipping e-brief, October 2008.  
<http://www.incelaw.com/publications/ebriefapril2008/shippingebriefoctober2008/doesthistastesaltytoyouusrulebattachmentsinnewyork/> [Visited August 1, 2009]
- Steamship (2001) *U.S. – Obtaining Security for Maritime Claims – Rule B Attachment* December 2001, *Sea Venture* Volume 20, Steamship Mutual  
[http://www.simsi.com/US\\_RuleB1201](http://www.simsi.com/US_RuleB1201) [Visited August 10, 2009]
- Murnane (2006) Murnane, Don P., Elliott, Jr. Michael C. *U.S. – Developments in Rule B Attachment*, January 2006, Steamship Mutual



<http://www.simsl.com/Articles/RuleB1205.asp> [Visited August 10, 2009]

White (2007)

White, Ralph A *Synopsis of Supplemental Rules B, C and D for Admiralty or Maritime Claims*, 2007

<http://www.olemiss.edu/orgs/SGLC/MS-AL/Water%20Log/27.3admiralty.htm> [Visited July 29, 2009]

### **Personal communication**

Chalos (25.07.2009)

George M. Chalos, E-mail of 25.07.2009

Chalos (09.08.2009)

George M. Chalos, E-mail of 09.08.2009

Chalos (28.08.2009)

George M. Chalos, E-mail of 28.08.2009

**Annex I. International Convention Relating to the Arrest of Sea-Going Ships  
(Brussels 1952)**

Source: <http://www.admiraltylawguide.com/conven/arrest1952.html>

**International Convention Relating to the Arrest of Sea-Going Ships**

*(Brussels, May 10, 1952)*

[Preamble Omitted]

**ARTICLE 1**

In this Convention the following words shall have the meanings hereby assigned to them:

(1) "Maritime Claim" means a claim arising out of one or more of the following:

- (a) damage caused by any ship either in collision or otherwise;
- (b) loss of life or personal injury caused by any ship or occurring in connection with the operation of any ship;
- (c) salvage;
- (d) agreement relating to the use or hire of any ship whether by charterparty or otherwise;
- (e) agreement relating to the carriage of goods in any ship whether by charterparty or otherwise;
- (f) loss of or damage to goods including baggage carried in any ship;
- (g) general average;

- (h) bottomry;
- (i) towage;
- (J) pilotage;
- (k) goods or materials wherever supplied to a ship for her operation or maintenance;
- (l) construction, repair or equipment of any ship or dock charges and dues;
- (m) wages of Masters, Officers, or crew;
- (n) Master's disbursements, including disbursements made by shippers, charterers or agent on behalf of a ship or her owner;
- (o ) disputes as to the title to or ownership of any ship;
- (p) disputes between co-owners of any ship as to the ownership, possession, employment, or earnings of that ship;
- (q) the mortgage or hypothecation of any ship.

(2) "Arrest" means the detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment.

(3) "Person" includes individuals, partnerships and bodies corporate, Governments, their Departments, and Public Authorities.

(4) "Claimant" means a person who alleges that a maritime claim exists in his favour.

## **ARTICLE 2**

A ship flying the flag of one of the Contracting States may be arrested in the jurisdiction of any of the Contracting States in respect of any maritime claim, but in respect of no other

claim; but nothing in this Convention shall be deemed to extend or restrict any right or powers vested in any governments or their departments, public authorities, or dock or harbour authorities under their existing domestic laws or regulations to arrest, detain or otherwise prevent the sailing of vessels within their jurisdiction.

### **ARTICLE 3**

(1) Subject to the provisions of para. (4) of this article and of article 10, a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail; but no ship, other than the particular ship in respect of which the claim arose, may be arrested in respect of any of the maritime claims enumerated in article 1, (o), (p) or (q).

(2) Ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

(3) A ship shall not be arrested, nor shall bail or other security be given more than once in any one or more of the jurisdictions of any of the Contracting States in respect of the same maritime claim by the same claimant: and, if a ship has been arrested in any of such jurisdictions, or bail or other security has been given in such jurisdiction either to release the ship or to avoid a threatened arrest, any subsequent arrest of the ship or of any ship in the same ownership by the same claimant for the maritime claim shall be set aside, and the ship released by the Court or other appropriate judicial authority of that State, unless the claimant can satisfy the Court or other appropriate judicial authority that the bail or other security had been finally released before the subsequent arrest or that there is other good cause for maintaining that arrest.

(4) When in the case of a charter by demise of a ship the charterer and not the registered owner is liable in respect of a maritime claim relating to that ship, the claimant may arrest such ship or any other ship in the ownership of the charterer by demise, subject to the provisions of this Convention, but no other ship in the ownership of the registered owner

shall be liable to arrest in respect of such maritime claim. The provisions of this paragraph shall apply to any case in which a person other than the registered owner of a ship is liable in respect of a maritime claim relating to that ship.

#### **ARTICLE 4**

A ship may only be arrested under the authority of a Court or of the appropriate judicial authority of the contracting State in which the arrest is made.

#### **ARTICLE 5**

The Court or other appropriate judicial authority within whose jurisdiction the ship has been arrested shall permit the release of the ship upon sufficient bail or other security being furnished, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1, (o ) and (p). In such cases the Court or other appropriate judicial authority may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient bail or other security, or may otherwise deal with the operation of the ship during the period of the arrest. In default of agreement between the parties as to the sufficiency of the bail or other security, the Court or other appropriate judicial authority shall determine the nature and amount thereof. The request to release the ship against such security shall not be construed as an acknowledgment of liability or as a waiver of the benefit of the legal limitations of liability of the owner of the ship.

#### **ARTICLE 6**

All questions whether in any case the claimant is liable in damages for the arrest of a ship or for the costs of the bail or other security furnished to release or prevent the arrest of a ship, shall be determined by the law of the Contracting State in whose jurisdiction the arrest was made or applied for.

The rules of procedure relating to the arrest of a ship, to the application for obtaining the authority referred to in Article 4, and to all matters of procedure which the arrest may

entail, shall be governed by the law of the Contracting State in which the arrest was made or applied for.

## **ARTICLE 7**

(1) The Courts of the country in which the arrest was made shall have jurisdiction to determine the case upon its merits if the domestic law of the country in which the arrest is made gives jurisdiction to such Courts, or in any of the following cases namely:

(a) if the claimant has his habitual residence or principal place of business in the country in which the arrest was made;

(b) if the claim arose in the country in which the arrest was made;

(c) if the claim concerns the voyage of the ship during which the arrest was made;

(d) if the claim arose out of a collision or in circumstances covered by article 13 of the International Convention for the unification of certain rules of law with respect to collisions between vessels, signed at Brussels on 23rd September 1910;

(e) if the claim is for salvage;

(f) if the claim is upon a mortgage or hypothecation of the ship arrested.

(2) If the Court within whose jurisdiction the ship was arrested has not jurisdiction to decide upon the merits, the bail or other security given in accordance with article 5 to procure the release of the ship shall specifically provide that it is given as security for the satisfaction of any judgment which may eventually be pronounced by a Court having jurisdiction so to decide; and the Court or other appropriate judicial authority of the country in which the claimant shall bring an action before a Court having such jurisdiction.

(3) If the parties have agreed to submit the dispute to the jurisdiction of a particular Court other than that within whose jurisdiction the arrest was made or to arbitration, the Court or

other appropriate judicial authority within whose jurisdiction the arrest was made may fix the time within which the claimant shall bring proceedings.

(4) If, in any of the cases mentioned in the two preceding paragraphs, the action or proceeding is not brought within the time so fixed, the defendant may apply for the release of the ship or of the bail or other security.

(5) This article shall not apply in cases covered by the provisions of the revised Rhine Navigation Convention of 17 October 1868.

## **ARTICLE 8**

(1) The provisions of this Convention shall apply to any vessel flying the flag of a Contracting State in the jurisdiction of any Contracting State.

(2) A ship flying the flag of a non-Contracting State may be arrested in the jurisdiction of any Contracting State in respect of any of the maritime claims enumerated in article 1 or of any other claim for which the law of the Contracting State permits arrest.

(3) Nevertheless any Contracting State shall be entitled wholly or partly to exclude from the benefits of this convention any government of a non-Contracting State or any person who has not, at the time of the arrest, his habitual residence or principal place of business in one of the Contracting States.

(4) Nothing in this Convention shall modify or affect the rules of law in force in the respective Contracting States relating to the arrest of any ship within the jurisdiction of the State of her flag by a person who has his habitual residence or principal place of business in that State.

(5) When a maritime claim is asserted by a third party other than the original claimant, whether by subrogation, assignment or other-wise, such third party shall, for the purpose of this Convention, be deemed to have the same habitual residence or principal place of business as the original claimant.

## **ARTICLE 9**

Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.

## **ARTICLE 10**

The High Contracting Parties may at the time of signature, deposit or ratification or accession, reserve:

(a) the right not to apply this Convention to the arrest of a ship for any of the claims enumerated in paragraphs (o ) and (p) of article 1, but to apply their domestic laws to such claims;

(b) the right not to apply the first paragraph of article 3 to the arrest of a ship within their jurisdiction for claims set out in article 1 paragraph (q).

## **ARTICLE 11**

The High Contracting Parties undertake to submit to arbitration any disputes between States arising out of the interpretation or application of this Convention, but this shall be without prejudice to the obligations of those High Contracting Parties who have agreed to submit their disputes to the International Court of Justice.

## **ARTICLE 12**

This Convention shall be open for signature by the States represented at the Ninth Diplomatic Conference on Maritime Law. The protocol of signature shall be drawn up through the good offices of the Belgian Ministry of Foreign Affairs.



### **ARTICLE 13**

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Ministry of Foreign Affairs which shall notify all signatory and acceding States of the deposit of any such instruments.

### **ARTICLE 14**

(a ) This Convention shall come into force between the two States which first ratify it, six months after the date of the deposit of the second instrument of ratification.

(b ) This Convention shall come into force in respect of each signatory State which ratifies it after the deposit of the second instrument of ratification six months after the date of the deposit of the instrument of ratification of that State.

### **ARTICLE 15**

Any State not represented at the Ninth Diplomatic Conference on Maritime Law may accede to this Convention.

The accession of any State shall be notified to the Belgian Ministry of Foreign Affairs which shall inform through diplomatic channels all signatory and acceding States of such notification.

The Convention shall come into force in respect of the acceding State six months after the date of the receipt of such notification but not before the Convention has come into force in accordance with the provisions of Article 14(a).

### **ARTICLE 16**

Any High Contracting Party may three years after coming into force of this Convention in respect of such High Contracting Party or at any time thereafter request that a conference be convened in order to consider amendments to the Convention.

Any High Contracting Party proposing to avail itself of this right shall notify the Belgian Government which shall convene the conference within six months thereafter.

#### **ARTICLE 17**

Any High Contracting Party shall have the right to denounce this Convention at any time after the coming into force thereof in respect of such High Contracting Party. This denunciation shall take effect one year after the date on which notification thereof has been received by the Belgian Government which shall inform through diplomatic channels all the other High Contracting Parties of such notification.

#### **ARTICLE 18**

(a ) Any High Contracting Party may at the time of its ratification of or accession to this Convention or at any time thereafter declare by written notification to the Belgian Ministry of Foreign Affairs that the Convention shall extend to any of the territories for whose international relations it is responsible. The Convention shall six months after the date of the receipt of such notification by the Belgian Ministry of Foreign Affairs extend to the territories named therein, but not before the date of the coming into force of the Convention in respect of such High Contracting Party.

(b ) A High Contracting Party which has made a declaration under paragraph (a ) of this Article extending the Convention to any territory for whose international relations it is responsible may at any time thereafter declare by notification given to the Belgian Ministry of Foreign Affairs that the Convention shall cease to extend to such territory and the Convention shall one year after the receipt of the notification by the Belgian Ministry of Foreign Affairs cease to extend thereto.

(c ) The Belgian Ministry of Foreign Affairs shall inform through diplomatic channels all signatory and acceding States of any notification received by it under this Article.

DONE in Brussels, on May 10, 1952, in the French and English languages, the two texts being equally authentic.

## **ANNEX II. Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Extracts)**

Source: <http://www.law.cornell.edu/rules/frcp/>

### **Rule A. - Scope of Rules**

(1) These Supplemental Rules apply to:

(A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

(i) maritime attachment and garnishment,

(ii) actions in rem,

(iii) possessory, petitory, and partition actions, and

(iv) actions for exoneration from or limitation of liability;

(B) forfeiture actions in rem arising from a federal statute; and

(C) the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.

(2) The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

## **Rule B. In Personam Actions: Attachment and Garnishment**

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process.

In an in personam action:

(a) If a defendant is not found within the district, when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property - up to the amount sued for - in the hands of garnishees named in the process.

(b) The plaintiff or the plaintiff's attorney must sign and file with the complaint an affidavit stating that, to the affiant's knowledge, or on information and belief, the defendant cannot be found within the district. The court must review the complaint and affidavit and, if the conditions of this Rule B appear to exist, enter an order so stating and authorizing process of attachment and garnishment. The clerk may issue supplemental process enforcing the court's order upon application without further court order.

(c) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must issue the summons and process of attachment and garnishment. The plaintiff has the burden in any post-attachment under Rule E(4)(f) to show that exigent circumstances existed.

(d)

(i) If the property is a vessel or tangible property on board a vessel, the summons, process, and any supplemental process must be delivered to the marshal for service.

(ii) If the property is other tangible or intangible property, the summons, process, and any supplemental process must be delivered to a person or organization authorized to serve it, who may be (A) a marshal; (B) someone under contract with the United States; (C)

someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(e) The plaintiff may invoke state-law remedies under Rule 64 for seizure of person or property for the purpose of securing satisfaction of the judgment.

(2) Notice to Defendant.

No default judgment may be entered except upon proof - which may be by affidavit - that:

(a) the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4;

(b) the plaintiff or the garnishee has mailed to the defendant the complaint, summons, and process of attachment or garnishment, using any form of mail requiring a return receipt; or

(c) the plaintiff or the garnishee has tried diligently to give notice of the action to the defendant but could not do so.

(3) Answer.

(a) By Garnishee.

The garnishee shall serve an answer, together with answers to any interrogatories served with the complaint, within 20 days after service of process upon the garnishee. Interrogatories to the garnishee may be served with the complaint without leave of court. If the garnishee refuses or neglects to answer on oath as to the debts, credits, or effects of the defendant in the garnishee's hands, or any interrogatories concerning such debts, credits, and effects that may be propounded by the plaintiff, the court may award compulsory process against the garnishee. If the garnishee admits any debts, credits, or effects, they shall be held in the garnishee's hands or paid into the registry of the court, and shall be held

in either case subject to the further order of the court. (b) By Defendant. The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

(b) By Defendant.

The defendant shall serve an answer within 30 days after process has been executed, whether by attachment of property or service on the garnishee.

**Rule E. - Actions in Rem and Quasi in Rem: General Provisions (extracts)**

(4) Execution of Process; Marshal's Return; Custody of Property; Procedures for Release.

(a) In General.

Upon issuance and delivery of the process, or, in the case of summons with process of attachment and garnishment, when it appears that the defendant cannot be found within the district, the marshal or other person or organization having a warrant shall forthwith execute the process in accordance with this subdivision (4), making due and prompt return.

(f) Procedure for Release From Arrest or Attachment.

Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.